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NO. 21686
NO. 21868-A

V. 3478
3478
MAR 24 1969

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO and RONALD EUGENE TICKLE,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANT ROMERO'S PETITION FOR REHEARING
APPELLANT ROMERO'S REQUEST FOR REHEARING IN BANC

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I.

BRIEF STATEMENT OF THE CASE

On May 10, 1966, federal agents shot Appellant's car, viciously smashed him in the head with a gun butt, and arrested him without a warrant. Then the agents gave him an admittedly inadequate warning, interviewed him, and obtained an admission. One of the arresting agents then left the scene of the arrest, went to the United States Commission Office, and by utilizing

Appellant's post arrest statements he obtained a search warrant for Tickle's home. Appellant was not taken before the United States Commissioner, even though one of the arresting agents went before the Commissioner to obtain a search warrant. Appellant, as a prisoner, was taken by the agents to Tickle's home; he was compelled to go into Tickle's home, and he assisted in the search of Tickle's home during which time he made incriminating statements which were subsequently received in evidence against him at his trial. It was not until the next day that Appellant Romero was arraigned before the United States Commissioner.

On November 14, 1966, Appellant was sentenced to serve fifteen years in a federal penitentiary.

On November 14, 1966, Appellant filed his notice of appeal. Appellant has been at liberty on appeal bond for the past two and one-half years.

On September 30, 1967, Appellant filed his opening brief; the plaintiff filed a brief and Appellant filed a reply brief.

On March 4, 1968, oral argument was had, and this



Court took the matter under submission. Nearly one year later this Court handed down its brief written opinion in which it stated that, "Not one of appellants' nine specifications of error is worthy of discussion," and not one of the specifications was discussed.

II.

POINTS OF LAW AND FACTS

THE COURT HAS OVERLOOKED

Appellant has filed two briefs and had extensive oral argument on six major specifications of error. This Court's opinion never reached any of the specified errors, but preemptively dismissed them by stating that the case turns on its facts, there are no unsettled questions of law, and there is no need to discuss the specified errors. Nearly two and one-half years have elapsed since Appellant's opening brief was filed and this Court handed down its opinion; nearly a year elapsed between oral argument and written opinion.

- A. Appellant's arrest without a warrant lacked probable cause and is an illegal arrest.

On January 27, 1969, the United States Supreme Court in Spinelli v. United States, 37 L.W. 4110, reversed a conviction on the grounds that the search warrant obtained by the FBI was defective in that it lacked probable cause. There were three dissenting opinions.

The probable cause claimed by the government includes anonymous letters, months of surveillance, telephone record check, and an unidentified informant in another city without first-hand knowledge talking to unidentified agents, who in turn, talked to other agents.

If this Court will approach the facts in this case as the Supreme Court did in Spinelli, then the Appellant may well win his reversal.

It would seem that Appellant is entitled to have this Court analyze, weigh, decide and advise whether or not the arresting agents had anything more than rank suspicion.

Other than Appellant's post arrest admission, the evidence as to probable cause is also the total evidence of guilt beyond a reasonable doubt. The trial court had considerable difficulty with the motion to suppress, and were it not for the admittedly inadmissible

post arrest statements which were admitted, this Appellant probably would have been acquitted.

When there has been a serious professional attempt to appeal a conviction on the grounds that the evidence is insufficient, and the details of the insufficiency have been carefully delineated in the briefs and discussed in oral argument, then the litigants and their counsel are entitled to more from an Appellate tribunal than a statement that there is no merit in the appeal. Our jurisprudential history is such that lower courts, litigants, and counsel expect, need and have come to rely upon a full detailed, written appellate decision.

Here, perhaps because of the long lapse of time between the briefs and oral argument and the Court's decision, the Court has not fulfilled its traditional role of rendering a complete decision.

B. Appellant's post arrest statements were not admissible, and the government conceded that Appellant had been given an inadequate warning, yet some of these statements were used in a search warrant and all of these statements were received in evidence.

Federal agents shot Appellant's car, slugged him with a gun and fists, and arrested him without a warrant (and without probable cause). The agents then gave him what the government conceded at the trial was a legally insufficient warning under Miranda v. United States. Appellant, still bleeding, then made several admissions. These admissions, in spite of the government's concession that Appellant had not been adequately warned were admitted into evidence at the trial. The trial court expressed doubt about the admissibility of these statements at the hearing on the motion to suppress, and stated that the warning: "doesn't meet the Miranda standard," yet they were admitted. This Court is requested to re-examine, reweigh, and then detail its analysis, reasoning and conclusions in its written opinion as to the legality and propriety of the admissibility of such evidence.

Appellant's post arrest statements were taken to the nearest United States Commissioner without unnecessary delay, set down in an incomplete affidavit for a search warrant, and a search warrant issued. But Appellant was not taken before the Commissioner. Instead

the agents held him as a prisoner in the field and waited for the search warrant. When they had the search warrant and searched Appellant Tickle's home and found nothing, the agents then took Appellant Romero into the home and had him assist in the search. Appellant Romero made admissions during this search which were received in evidence (in spite of the above-mentioned concession) and which form the basis for his conviction on Count Two.

The next day Appellant was taken before the Commissioner. This is a classic case to illustrate a violation of Rule 5 (a) of the Federal Rules of Criminal Procedure, and the Supreme Court in Mallony v. United States, 354 U.S. 449, 77 S. Ct. 1356 (1957), clearly spelled out that statements made during a time when a prisoner has been held without a prompt arraignment are not admissible. It is difficult to conceive of a sharper illustration of a violation of Rule 5 (a). An arresting agent leaves the arrestee in the field and goes to the nearest United States Commissioner to secure a search warrant in which he utilizes the post arrest statements of the arrestee. If the agent can take the statements of the arrestee to the Commissioner and he doesn't take the arrestee

himself, the inevitable conclusion is that there was unnecessary delay in arraignment. And when the arrestee subsequently makes additional statements, while as a prisoner he is compelled to assist them search another man's home, then such statements can not be received in evidence. Here these statements were received in evidence, and this should explain why or how or if such statements are ever admissible.

There are additional reasons that were put forth challenging the admissibility of these statements: If there was no probable cause to arrest him (as he seriously contends), then under the holding of Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407 (1963) such statements are inadmissible; and can a beaten, bleeding, handcuffed prisoner make a statement within minutes after his arrest that this Court will say is voluntary in view of Stein v. New York, 346 U.S. 156 (1952).

Four separate, distinct, constitutional arguments were prepared, briefed and argued as to why Appellant's statements are not admissible:

1. He was not adequately warned pursuant to

Miranda, which was conceded by the government and noted by the trial court.

2. He was not promptly arraigned and his statements were obtained during a period of unlawful detention.

3. He was arrested without probable cause.

4. His statements were not voluntary in view of his condition as caused by the agents.

Any one of these arguments, standing alone, compels a reversal of this case by this Court. The answers to these problems do not merely turn upon the facts. What is unnecessary delay? Can agents be permitted to do what they did here -- if this Court doesn't explain the law in relation to these facts then agents have a right to conduct themselves in such a shocking manner. Is it permissible to give a faulty insufficient warning to an arrestee, have the government concede that the warning was defective, have the trial court comment that the warning was legally inadequate, and then receive the arrestee's statements into evidence? A discussion of

the facts will not resolve this issue; and a discussion of the law will not resolve this issue; but a detailed analysis of the facts and a reasoned application of the law to those facts will at least satisfy the various legal obligations of those involved.

These arguments do have merit, and should be dealt with by this Court in other than a summary, conclusive fashion. This Appellant has paid extremely high bail premiums to earn his liberty for the past year while this case was under submission, and counsel respectfully and sincerely urges this Court to reconsider this matter. If Appellant is to remain convicted, isn't he at least entitled to know why?

C. The search warrant in this case is fatally defective.

Since this case was briefed and argued, the United States Supreme Court by a divided Court decided the Spinelli case (supra) in which they analyzed, dissected and decided that a search warrant was defective. In the briefs in this case, counsel has gone to some lengths to analyze, appraise, dissect and argue the very points

set forth in the Court's majority opinion. This petition for rehearing is meant to be an articulate plea to this Court to at least explain wherein this Appellant's fifteen years in a federal penitentiary is legally warranted.

D. The evidence is insufficient to support Appellant's convictions.

Appellant's opening brief and his reply brief concentrated on a thorough review of the evidence and pointed out with specificity wherein the evidence was insufficient as to each count. Applicable law was cited and applied to the facts, but this Court without discussion merely states that it reviewed the record and finds no merit in the specified errors. Isn't this Appellant entitled to more from this Court? He is facing a fifteen-year sentence; he has been at liberty on bail since May of 1966 by paying thousands of dollars a year in bond premiums, he has hired and paid experienced competent counsel who have asserted their best effort on what they feel is a meritorious appeal for numerous reasons; and he has earned and deserves the analysis, reasoning and detailed written opinion of this Court.

III.

REQUEST FOR HEARING IN BANC

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Appellant requests a hearing in banc on this petition.

IV.

CONCLUSION

Appellant respectfully urges this Court to grant this petition for rehearing and allow additional briefs and argument.

There are grave issues of constitutional importance involved in this case, and Appellant's counsel who have had the advantage of years of practical trial and appellate practice in Federal Court urge this Court to reconsider its opinion and grant this petition. Other counsel have borrowed and read the briefs in this case and favored Appellant's counsel with their comments -- all of which have been to the effect that Appellant has a very meritorious case. This Court's opinion does not do justice to this Appellant, the trial court, the government personnel, the counsel or the briefs and arguments. Counsel is hopeful of persuading this Court that it must reverse the conviction,

but at the least counsel is hopeful of obtaining a detailed discussion and analysis in a written opinion that is reviewable.

Respectfully submitted,

SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE

By



Thomas R. Sheridan

Attorneys for Appellant

NO. 21935

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STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION

On February 8, 1967, the Federal Grand Jury for the Central District of California returned an indictment in one count charging Appellant Ascencion Vasquez-Lopez with a violation of Title 21, United States Code, Section 176(a) [R. T. 2].^{1/} The indictment charged that on or about January 30, 1967, in Los Angeles County, within the Central District of California, the defendant, with intent to defraud the United States, knowingly received, concealed and facilitated the transportation and concealment of 36,751.900 grams of marihuana, which said

1/ "R. T. " refers to Reporter's Transcript of Proceedings.

marihuana, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to law.

On February 13, 1967, Appellant was arraigned and pleaded not guilty [R.T. 3]. A jury trial was commenced on April 18, 1967, before the Honorable A. Andrew Hauk, United States District Judge.

On April 20, 1967, a verdict of guilty was returned by the jury; on May 15, 1967, judgment of conviction was entered. Appellant was sentenced to the custody of the Attorney General under the Federal Youth Corrections Act [R.T. 72].

On May 16, 1967, Appellant filed a timely notice of appeal. On June 13, 1967, Appellant filed a motion and affidavit of support to appeal in forma pauperis [R.T. 75]. On June 13, 1967, this motion was granted [R.T. 77].

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231. Jurisdiction of this Court is based on Title 28, United States Code, Section 1291.

STATEMENT OF FACTS

On a day prior to January 30, 1967, Federal Narcotic Agent Ortiz (while working undercover) made arrangements with a supplier in Tijuana, Mexico, to purchase 50 kilograms of marihuana. Delivery was set for January 30, 1967. On that date, at 9:30 A.M., Agent Ortiz was to go to a house located

at 6235 Bissell Street in Huntington Park; there he was to meet an individual who went by the name of Chon or Pecas. This man was to deliver the marihuana to him in exchange for \$3,000.00 (\$300.00 directly to the individual, and \$2,700.00 in an envelope for the supplier in Tijuana) [R. T. 65].

On January 30, 1967, Agent Ortiz went to the house in Huntington Park and knocked on the door. It was opened by the defendant who then identified himself as Chon or Pecas and stated that he had been sent by Rafael. When asked if he had the merchandise, the defendant replied that he did and that it was in the car. Agent Ortiz said that he wanted to see it before paying and both men went to the car [R. T. 65]. When he reached the car, Agent Ortiz, still unable to see the merchandise, once more asked the defendant where the marihuana was and the defendant responded that it was in the door panels as evidenced by the fact that one could not roll down the back windows [R. T. 66]. Agent Ortiz then put his face close to the window of the car and detected the aroma of marihuana [R. T. 67].

On being asked where in the car the marihuana was placed the defendant responded that it was in the door panels of the rear doors and that he was sure because he had helped load the car on the previous day [R. T. 67].

Agent Ortiz asked the defendant if it was all in the door panels, to which the defendant responded that he didn't know, and that Ortiz would have to call Rafael in Tijuana to find out. Each man entered his own car to go to a phone booth on Bissell

Street [R. T. 67].

At the intersection of Bissell and Gage Streets, Agent Cortiz gave a prearranged signal to Agents Paulus and Lusardi. Both cars were forced to the curb and both drivers arrested [R. T. 68]. Agents Lusardi and Paulus immediately searched the defendant's vehicle. They found marihuana in the two rear door panels and in the two rear wheel wells of the interior [R. T. 78]. This substance was introduced into evidence as Government's Exhibit No. 1, 1-A and 1-B [R. T. 81].

Agent Paulus testified that shortly after noon on the day of the arrest he had a conversation with the defendant. He first asked the defendant whether he understood English; the defendant answered that he did not. Therefore, Agent Paulus, a graduate of the Justice Department Spanish Language School at Port Isabel, Texas [R. T. 137] warned him of his rights in Spanish [R. T. 138, 141]. Agent Paulus then asked the defendant whether he understood his rights; the defendant replied that he did [R. T. 141]. Agent Paulus, while in the process of filling out Immigration forms, questioned the defendant about his activities in crossing the border [R. T. 139].

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ARGUMENT

I

THE TRIAL COURT PROPERLY EXERCISED
ITS STATUTORY DISCRETION IN REFUSING
TO ACCEPT APPELLANT'S REQUEST FOR
A NON-JURY TRIAL.

In order for a defendant to waive his constitutional right to a jury trial, he must meet the requirements of Federal Rule of Criminal Procedure 23(a), Title 18, United States Code. To do so, not only must the defendant file a written request, but he must also secure the approval of both the Government and the Court.

In Patton v. United States, 281 U.S. 276, 312 (1930), the Court affirmed the policy of allowing the trial court to use its discretion in accepting or rejecting a defendant's request to waive his right to a jury trial when it stated:

"In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events

Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by

long experience, and are not now to be denied. Not only must the right of the accused to a trial by constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." (Emphasis added.)

In charging the trial judge to use sound discretion, in ruling on the defendant's request, the Court further stated, "And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial" Id. 312.

In affirming the policy of both the Patton decision, and Rule 23(a), the courts have pointed out that Amendment VI of the Constitution creates only a right to a jury trial; no correlative right to a non-jury trial is created. The courts have also required the consent of both the Court and the Government before allowing the defendant to waive his right to a jury trial.

Singer v. United States, 380 U.S. 24 (1965)

C.I.T. Corporation v. United States,

150 F.2d 85 (9th Cir., 1945);

Mason v. United States, 250 F.2d 704

(10th Cir., 1957);

Dixon v. United States, 292 F.2d 768

(D.C. 1961);

United States v. Igoe, 331 F.2d 766

(7th Cir. 1964).

It has not been argued, and no evidence has been introduced to show, that the defendant received an unfair sentence as a result of his having been tried and convicted by a jury. In fact, he was sentenced under the Youth Corrections Act, Title 18, United States Code, Section 5010(b), instead of under the normal sentencing provisions which requires a five-year mandatory minimum sentence. See Title 26, United States Code, Section 7237. Appellant has been subsequently discharged and deported to Mexico.

In discussing the absence of prejudice in cases where either the Court or the Government has refused to accept an accused's waiver of his right to jury trial the Court in Singer v. United States, 380 U.S. 24 (1965) pointed out that ". . . the result is simply that the defendant is subject to an impartial trial by jury -- the very thing that the Constitution guarantees him." (Page 36.)

Therefore, the trial court's refusal to accept Appellant's waiver of his right to a jury trial was not in error.

II

THE APPELLANT DID NOT, AT ANY TIME, ATTEMPT TO ENTER A PLEA OF GUILTY. EVEN IF HE HAD ENTERED SUCH A PLEA, THE TRIAL COURT COULD HAVE PROPERLY EXERCISED ITS STATUTORY DISCRETION IN REFUSING TO ACCEPT IT.

The record does not indicate any attempt, by the Appellant, to enter a plea of guilty. A discussion of the possibility that the defendant might have entered a plea of guilty was initiated by Mr. Lawrence [R. T. 14]. At that time, he stated that he had recommended a plea of guilty to a possible superseding Information charging a tax count, but that his client had indicated that he was not guilty and could not make such a plea. The Court then indicated to Mr. Lawrence that, in light of the defendant's belief, the proper procedure would be to go ahead and try the case. This dialogue is set forth below:

* * * * *

"(The following proceedings took place in the chambers of the Court, with all parties present, including the defendant and an interpreter:)

"MR. LAWRENCE: I have recommended if there is any possibility of his being guilty that he change his plea, in view of the alternatives.

"THE COURT: You mean in connection with a possible superseding Information charging a tax count?

"MR. LAWRENCE: Yes.

"THE COURT: Have you explained to him the difference in penalties?

"MR. LAWRENCE: I have gone over that on numerous occasions.

"THE COURT: There are certain mandatory penalties in the so-called non-tax count cases.

"MR. LAWRENCE: Yes. I have spent, I would say, five hours with him in going over --

"THE COURT: What is his reaction?

"MR. LAWRENCE: He indicated that he is not guilty.

"THE COURT: Well, then, we go ahead and try it. That is all I think we can do.

"MR. NASATIR: Yes, sir.

"THE COURT: The Government thinks you have a good case?

"MR. NASATIR: Yes, your Honor.

"THE COURT: That is all we can do. If he thinks he is not guilty, I won't permit him to put in a guilty plea [R. T. 14-15]."

The Court questioned Mr. Lawrence at two other times about the possibility of a plea of guilty; both times it was assured by counsel that the defendant believed that he was not guilty, and was, therefore, unable to make such a plea. Both dialogues

are present below:

* * * * *

"THE COURT: You are not considering this superseding Information? Have you explained to him the difference in penalties?

"MR. LAWRENCE: Yes, on numerous occasions and at great length. He advises me that he would have to invent a story in order to make a plea [R. T. 10].

* * * * *

"THE COURT: I would like to get moving on it. What witnesses do you have?

"MR. LAWRENCE: Just the defendant.

"THE COURT: The defendant, himself. Where does he live?

"MR. LAWRENCE: Tijuana.

"THE COURT: He is not a National of this country?

"MR. NASATIR: No, your Honor, he is not.

"THE COURT: He still says he is not guilty?

"THE INTERPRETER: Yes, he is not guilty.

"THE COURT: All we can do is try it. Let's go out and pick a jury. I don't think it would be wise at all to accept any plea, in view of his statement that he is absolutely convinced he is not guilty. I don't want to indicate that he should do anything otherwise [R. T. 16]."

Rule 11, Federal Rules of Criminal Procedure, Title 18, United States Code (1966) not only grants the Court the discretion to refuse to accept a plea of guilty, but also requires that the Court, before accepting such a plea, first address the defendant to ascertain whether the presented plea is both voluntary and made with a full understanding of its meaning.

In Lynch v. Overholser, 369 U.S. 705, 719 (1962) the Court refused to accept the contention that a "criminal defendant has an absolute right to have his guilty plea accepted by the Court. " It stated that "As provided in Rule 11, Federal Rules of Criminal Procedure, . . . the trial judge may refuse to accept such a plea and enter a plea of not guilty on behalf of the accused. "

Therefore, in light of the strong doubt as to the defendant Vasquez-Lopez's desire for, and understanding of, an entry of a plea of guilty, had he attempted to enter such a plea the trial court could have acted properly in refusing to accept it.

III

APPELLANT'S STATEMENTS TO AGENT PAULUS WERE PROPERLY ADMITTED INTO EVIDENCE IN THAT THEY WERE MADE AFTER HE HAD RECEIVED AN ADEQUATE WARNING OF HIS RIGHTS, AND HAD SUBSEQUENTLY WAIVED THEM.

A. THE WARNING GIVEN BY AGENT PAULUS WAS PROPER IN THAT IT ADEQUATELY AND EFFECTIVELY INFORMED THE DEFENDANT OF HIS RIGHTS.

Agent Paulus testified that he made the following statement to Appellant before conversing with him:

"A. ' . . . I advised him that under the laws of this country that he had rights; that he had a right to obtain an attorney either from the Government or with his own funds, his own money; that he did not have to talk or did not have to give me any statements; that if he did give me any statements that these statements could be used in Federal Court against him; that he could have an attorney with him at the time that he spoke. He answered that he did not have an attorney and had no funds to obtain an attorney. I told him that shortly he would be brought before the Judge and the Judge would obtain an attorney for him at that time. '" [R. T. 138].

Later Agent Paulus, a graduate of the Justice Department Spanish Language School at Port Isabel, Texas [R.T. 137], stated the warning as he remembered he had given it in Spanish. As related to the Court by the interpreter he said, "Under the law of this country you have rights. It is not necessary for you to speak anything. If you speak information to me, this information can be used against you in Federal Court. You can obtain an attorney from the Government of this country or with your money. When you speak it is necessary for you to speak slowly, correctly, completely -- and then, your Honor, he used an English word, 'voluntarily.' Mister, you understand your rights?"

"THE WITNESS: He answered that he understood his rights. That was the extent of that part. [R.T. 141].

The Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966) did not set out a specific warning which every law enforcement agency would be required to give, but rather chose to allow each agency freedom in formulating its own; the Court required only that " . . . the accused must be adequately and effectively apprised of his rights " (Id. 467). Although the Court chose not to dictate a specific form, it did summarize the requisite elements of a proper warning on page 444, where it said, "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

In Coyote v. United States, 380 F.2d 305 (10th Cir. 1967)

cert. denied 389 U.S. 976, the policy of testing a warning by its substance rather than its form was followed. The Court stated:

"Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advise to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all his rights." Id. 308.

See also, Green v. United States,

386 F.2d 953 (10th Cir., 1967).

In Keegan v. United States, 385 F.2d 260 (9th Cir., 1967)

the Court found the substance of the following warning sufficient.

"You don't have to say anything without the presence of an attorney. Anything that may be said out of the presence of an attorney could be held against you in a Court of law. If you don't have funds to pay for an attorney, we will appoint one." Id. 262.

In Coyote v. United States, *supra*, the defendant was informed that he had a right to remain silent, and that anything

he said could be used against him. He was also given a written statement which included a warning that " . . . I can talk to a lawyer or anyone before saying anything, and that the judge will get me a lawyer if I am broke." Id. 307. This warning was held to be adequate and effective.

Certainly, the warning, administered by Agent Paulus to the Appellant, conveyed the information required by the Miranda decision as adequately and effectively as the warnings cited above.

It has often been contended that a failure to expressly advise a defendant that he had an immediate right to obtain an attorney at the moment the warning was given constituted error. However, once more the courts have not required a specific pattern of words, but have chosen to determine whether the possible ambiguity in a warning could have been interpreted so as to give the defendant the understanding that he had an immediate right to counsel.

In Coyote, supra, the Court, through recognizing the possible ambiguity in the warning that " . . . the judge will get me a lawyer if I'm broke" at 307, held that it was sufficient to inform the defendant of his immediate right to counsel.

The defendant in Alexander v. United States, 380 F.2d 33 (8th Cir., 1967), was given the following warning:

" . . . you have a right to have a lawyer of your own choosing if you have the money. If you don't an attorney will be furnished you gratis, free

by the County of Richardson, state of Nebraska.
You need not make any statement, but if you do
make any statement that statement will be used
in court against you." Id. 35, note 1.

Although this warning did not include an express statement that
appointed counsel could be provided the defendant immediately,
the Court held that it was sufficient to inform him of his rights.

Therefore, the warnings given by Agent Paulus were
substantively sufficient to adequately and effectively warn the
appellant of his constitutional rights.

B. STATEMENTS MADE AFTER A
SUFFICIENT WAIVER OF RIGHTS
WERE PROPERLY ADMITTED
INTO EVIDENCE.

The Miranda holding does not make all statements
inadmissible at trial. The court was careful to point out that:

"In dealing with statements obtained through
interrogation, we do not purport to find all confessions
inadmissible. Confessions remain a proper element
in law enforcement. Any statement given freely,
voluntarily without any compelling influences is, of
course, admissible in evidence." Id. 478.

The Miranda Court placed on the Government the burden
of proving a sufficient waiver of the defendant's rights. The
Government contends that it met this burden when it introduced
testimony of Agent Paulus in which he stated that he had asked

the defendant the question, "Mister, you understand your rights?" to which the defendant reportedly responded ". . . that he understood his rights." [R. T. 141].

The record does not indicate that the appellant ever requested that an attorney be present during the interrogation; therefore, there is no evidence that Agent Paulus refused such a request or that the interrogation was in violation of the Miranda requirements. After being told of his right to counsel, appellant merely stated that ". . . he did not have an attorney and had no funds to obtain an attorney." [R. T. 138]. Once more Agent Paulus told him that one could be obtained at the expense of the Government, but the defendant did not request that this be done. Inasmuch as the defendant had not only indicated that he understood his rights, but also had failed to request the presence of an attorney (after having been told twice that one would be provided at the government's expense), Agent Paulus continued his questioning; the defendant freely and voluntarily answered these questions.

After having been fully advised of his rights and indicating that he understood them, the defendant chose to speak. As such, the record clearly demonstrates a knowing and intelligent waiver.

In United States v. Hayes, 385 F.2d 375 (4th Cir., 1967), the defendant was asked whether he understood the warning, or whether he wanted the assistance of counsel. The Court held that:

" . . . we cannot accept appellant's suggestion that because he did not make a statement -- written or

oral -- that he fully understood and voluntarily waived his rights after admittedly receiving the appropriate warnings, his subsequent answers were automatically rendered inadmissible. Of course, the attendant facts must show clearly and convincingly that he did relinquish his constitutional rights knowingly, intelligently, and voluntarily, but a statement by the defendant to that effect is not an essential link in the chain of proof." Id. 377. (Emphasis added.)

In this case the Government has shown that the defendant was asked whether he understood his rights, and that he answered that he did. This certainly exceeds the requirements of the Hayes case.

In Coughlan v. United States, (9th Cir. No. 21, 626, February 20, 1968) the Court held certain statements admissible even though the record failed to disclose an express statement that the defendant waived his rights.

Both the Hayes and Coughlan opinions are consistent with principles espoused in Miranda which requires an express waiver on record only ". . . in the absence of a fully effective equivalent . . . " Miranda at 476.

This case does not present a situation replete with coercion, extended interrogation, or any of the other evils that prompted the Court to require that each defendant be warned of his con-

stitutional rights and be given an opportunity to secure an attorney. The appellant was afforded these safeguards. After indicating that he understood the alternatives presented him, he freely and voluntarily answered the questions directed to him by Agent Paulus. Therefore, since the Appellant's rights were fully protected, the answers to Agent Paulus' questions were properly received in evidence.

IV

ASSUMING ARGUENDO THAT APPELLANT'S STATEMENTS ARE INADMISSIBLE, THEIR INTRODUCTION INTO EVIDENCE CONSTITUTED HARMLESS ERROR.

As pointed out by the Court in Chapman v. California, 386 U.S. 18, 21 (1966), not "all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful."

The Chapman court went on to state that ". . . there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Id. 22.

The Court set the standard for review in its holding that ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. 24.

A strict harmless error rule is necessary to prevent the introduction of "highly important and persuasive evidence, or argument, though legally forbidden" from finding its way "into a trial in which the question of guilt or innocence is a close one." Id. 22.

In this case the statements, made to Agent Paulus and related by him to the Court, do not fall within the category of "highly important and persuasive evidence." They were merely responses to questions asked by Agent Paulus in his attempt to gain information necessary to complete forms for the Immigration Department [R.T. 139].

The introduction of these statements was not prejudicial because the question of guilt or innocence was not "a close one" as required by the Chapman holding. Disregarding the entire testimony of Agent Paulus, the evidence presented by Agent Ortiz was more than sufficient to prove the defendant's guilt beyond a reasonable doubt.

The Court may properly determine whether the record stricken of all prejudicial evidence, contains sufficient evidence to uphold the conviction. If so, it may hold that the entry of improper evidence at the trial level was harmless error. Newman v. United States, 156 F.2d 8 (9th Cir., 1946), cert. den. 329 U.S. 766; Stevens v. United States, 256 F.2d 619 (9th Cir., 1958).

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
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ROBERT L. BROSIO,
Assistant U. S. Attorney,
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CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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No. 22037

See Vol. 3451

In the

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United States Court of Appeal

For the Ninth Circuit

PURER & COMPANY and PHILLIP
PURER,

Appellants,

vs.

AKTIEBOLAGET ADDO and ADDO
MACHINE COMPANY, INC.,

Appellees.

PETITION FOR REHEARING

FILED

MAR 28 1969

WM. B. LUCK, CLERK

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Appellees.

No. 22037

PETITION FOR REHEARING

Appellants respectfully request a rehearing in the above entitled matter on the following grounds:

A. That material facts were omitted from or incorrectly stated in the Opinion of the Court.

B. That substantial legal issues raised in Appellants' Brief were not considered in the Opinion of the Court.

C. That legal authorities cited in the Opinion of the Court were incorrectly applied to the facts in this case.

1. On pages 2-3 of the Opinion this court states that Exhibits 3 and 48 relevant to an issue of fact to be litigated were properly admitted into evidence.

It is respectfully submitted that these exhibits were not properly received in evidence.

a. The books and records of both plaintiffs were not listed in the Pre-Trial Order as Exhibits to be used upon the trial of the action (Local Rule 9 (g) VII.)

b. Appellants did request an examination of the books and records of plaintiffs' (C.T. p. 420; R.T. Oct. 10, 1966, pp. 3-4) but the motion was denied on the statement of appellees' counsel that they would not use the books and records upon the trial of the action.

c. Summaries of voluminous books and records may *be used in lieu of originals, only if a proper foundation has been laid.* The person who prepared the summaries must testify under oath that they were made by him and he must identify the sources that he used in preparing the summaries (*Sam Marci & Sons, Inc. v. U.S.A.*, 9th Cir., 1963, 313 F. 2d 119, 128-129.) No witness testified that the summaries (Exhibits 4 and 48) were made from books and records kept by plaintiffs in the ordinary course of business or that they were true, correct and genuine summaries of original entries.

(1) Gunnar Agrell testified, over objection, that Exhibit 4 was prepared not by him but by his accounting department (R.T. pp. 19-20).

(2) George Agrell testified that Exhibit 48 was not prepared by him but by his accounting department (R.T. p. 266) and that he changed what his

accounting department submitted to him (R.T. pp. 289-290).

d. *Baker & Ford v. United States*, 363 F. 2d 605, 609 (9th cir., 1966) does not support this Court's position that the summaries were properly admitted into evidence. In that cause one Fred Urban took the stand and testified that *he* prepared the summary from the original records (p. 607) which is not the same as the testimony of Gunnar Agrell and George Agrell, who both testified that the exhibits were prepared by someone else at their request.

e. Objections to the introduction of Exhibits 4 and 48 were made on the grounds that the records were the best evidence (R.T. pp. 19-20; 267) and it is respectfully submitted that these objections pose an adequate problem to the trial court to exercise discretion for the production of the original records from which the summaries were made.

2. On page 3 of the Opinion it is stated that Mr. Agrell inspected the machine when it arrived from Japan and it was Model 4001.

a. There is no proof that the machine that Addo received from Japan was a model BC-4001 or even that it was a Toshiba machine. The Court presumed that because Mr. Agrell requested his agents to obtain a Toshiba machine, his agents complied with his request (R.T. p. 511).

b. Mr. Agrell testified that *he didn't know* the model number of the machine (See appendix A as to his testimony.)

3. On page 3 of the Opinion the Court stated that at the trial Mr. Agrell was able to identify from the photographs which machine was the Toshiba Model BC-4001 and which was the Addo-X 341-E.

It is respectfully submitted that Mr. Agrell's testimony does not warrant this conclusion because the photographs before Mr. Agrell at the time of the trial were not the same that were taken by someone else in 1963. (R.T. pp. 53-54; Appendix B.)

4. On page 4 of its Opinion, referring to the Lindoteves-Jacoberg letters, this court states that the letters between Addo and Tokyo Denki were authenticated and properly admitted into evidence in support of the court's findings 23, 24, 25, 26, 28, 29, 30 and 50.

With due deference to this Court, it is respectfully submitted that these letters were never authenticated; they were never received in evidence to support a finding and they do not provide substantial evidence in support of these findings. Nor does this Court in its Opinion state how and in what manner these letters were authenticated or how or in what manner they were received in evidence sufficient to provide substantial evidence in support of the court's findings. The testimony that these letters were not offered as evidence and they were not received by the court as evidence is set forth in Appendix C.

5. On pages 5-6 of its Opinion this Court refers to Exhibits 53 through 57 inclusive and the fact that they were not admitted for the truth of the matters stated therein but merely for the limited purpose of showing the attitude and state of mind of the dealers under the circumstances.

a. It is respectfully submitted that these letters are not admissible for any purpose whatsoever.

b. Findings of Fact Nos. 68, 69 and 70 are predicated on the contents of these letters, holding that these dealers were confused.

c. Findings of Fact Nos. 68, 69 and 70 tend to support the plaintiff's claim of unfair competition (Conclusion of Law, No. VI).

6. On pages 6 and 7 of its Opinion this Court discusses the testimony of George Agrell and Carl Gronhagen relating to the conversations and concludes that (Op. p. 7) Purer's admissions were *properly admitted by the trial court*.

a. Appellants did not dispute that George Agrell and Carl Gronhagen could relate what they contend Mr. Purer said to them, and that the court could consider such conversations in arriving at its conclusion. But what appellants did assert and what this court ignores, is that the testimony of these two witnesses relating what they said Purer stated to them, still did not reach the required level of evidence sufficient to

warrant a finding of fraud. (App. Op. Br., pp. 46-51 and authorities.)

b. George Agrell did not relate what Mr. Purer said to him. His salient testimony is set forth in Appendix D (R.T. pp. 297-298). While it is true that under the circumstances the court had an option to determine at which time the witness speaks the truth (*People v. Pierce*, 269 A.C.A. 192, 202; p. 2d), nevertheless inconsistent answers are not clear and convincing evidence which is the minimum requisite necessary to establish fraud.

c. As to Mr. Gronhagen, there was no need to cross examine him for although he related a conversation regarding a machine, never at any time did he identify which machine he was talking about or which model of which machine.

7. On pages 8-9 of its Opinion this Court discussed the question of fraud. However, four important facts firmly established at the trial are not set forth in the opinion.

a. The letters Mr. Purer sent to Sweden (Exhibits 20 and 22, had etched on them the picture of a plant and the words "New Modern Facility in Ohito" and that Gunnar Agrell was charged with knowledge of what was printed on the letters (Cal. Civil Code Sec. 19).

b. That in June of 1965 George Agrell and Gunnar Agrell had a conversation wherein they decided to cancel the license agreement (R.T. p. 225).

c. That on June 30, 1965, as a result of this conversation, Alma Flesch, the attorney for George Agrell, sent a letter charging defendants with having obtained the license agreement by fraud (Exhibit B).

d. That this was *before* Gunnar Agrell had considered whether there was any grounds to cancel the license agreement.

Since a finding of fraud must be supported by *clear and convincing* evidence, the conclusion that it is supported by substantial evidence (Op. p. 8) is clearly erroneous and requires a reversal.

H. K. King & G. Shuler Corp. v. King, (1968)
Cal. 259 C.A. 2d 383, 396; 66 Cal. Rptr. 330
(and Appendix E).

8. On page 8 this court discusses findings of fact and conclusions of law on appellee's third cause of action for unfair competition. Omitted from the opinion are the important facts:

a. That there was no proof that the plaintiff's product or its name or slogan was associated *by the public* with the plaintiff's product.

b. That not a single witness was produced or any evidence offered that anyone ever purchased the appellants product thinking it was that of the plaintiff.

The court's holding, therefore, that unfair competition may be established without such finding is contrary to the settled law on unfair competition.

Moreover, it is respectfully submitted that the authorities relied upon by this Court on page 8 of its opinion are not in accord with this court's conclusion and are discussed in Appendix F.

9. On page 10 of its Opinion, this Court correctly states the law as to what the trial court must find to conclude that an infringement took place.

But the opinion states no facts whatsoever where defendants infringed upon plaintiff's patent.

It is respectfully submitted that there is no evidence *and there is no finding* indicating what portion of defendants' machine performs substantially the same function or accomplishes the identical result by substantially identical means of plaintiff's patented device.

To constitute infringement there must be specific findings indicating what portions of defendants' machines infringe upon the claims of plaintiff's patent. (*Autogiro Co. of America v. United States*, U.S.C.C. 1967, 384 F. 2d 391, 396 and cases cited in footnote 4.)

10. On pages 10 and 11 of its Opinion, this court refers to Section 285 of Title 28, U.S.C.A. that the court in exceptional cases may award reasonable attorney's fees to the prevailing party. (Presumably the court had reference to Title 35, not Title 28.)

The findings of this court, however, was that the license agreement was obtained by defendant's fraud-

ulent conduct (Finding of Fact No. 73, C.T. p. 603), and such a finding does not authorize an attorney's fee under Sec. 285 of Title 35, which is applicable only to matters in establishing patents infringement.

CONCLUSION

For all of the above reasons a rehearing should be granted.

—
Respectfully submitted,

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and

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Attorneys for Appellants.

Appendix

APPENDIX A

(R.T. pp. 52-53)

“BY MR. SHEA:

“Q. Did you inspect the photographs after they were taken?

“A. Yes.

“Q. Are you now able to identify *from the photographs in front of you*, which is the BC-4001 model and which is an Addo-X 341-E model?

“A. On some, yes. They are so similar it is difficult.”

The photographs that were taken in 1963 were sent to Lindoteves-Jacoberg (Opinion, p. 4). No evidence was offered that the photographs that Gunnar Agrell examined in court were the same photographs which were taken by someone in 1963 in Sweden and this Court also seems to have overlooked the evidence that the marks on these pictures were placed there two years later (R. T. pp. 54-55) (Ap. Op. Br., pp. 37-40.)

APPENDIX B

(R.T. pp. 53-54)

“Q. And did you inspect it to see whether there was any model number on it?

“A. It was the Model No. 4001 which was confirmed by letter from Lindeteves-Jacoberg.

“MR. FAIRFIELD: I move that the latter portion be stricken.

“THE COURT: All right, the latter part may be stricken.

“BY MR. SHEA:

“Q. Now, just confining yourself to what was on the machine, was there anything on the machine which established to show that it was Model BC-4001?

“MR. FAIRFIELD: We would object to it on the ground that the machine would be the real evidence on that.

“THE COURT: Overruled.”

We are seeking to accommodation and establish an identification of the pictures.

“MR. FAIRFIELD: That is correct, your Honor. Our position is that the machine is the real evidence and not the photographs.

“THE COURT: Overruled.

“BY MR. SHEA: Q. What was on the machine with reference to a model number?

“A. There was a sign. *I don't remember now.*”
(Emphasis added.)

APPENDIX C

Exhibits 10-19 were never in evidence in this cause. When Mr. Shea, counsel for appellees, submitted them to the court he did so not as evidence but only to show plaintiff's state of mind and they were received as such. As Mr. Shea stated (R.T. p. 38):

"I am going to offer a number of letters which are an exchange of correspondence between Lindoteves-Jacoberg and A. B. Addo, and also involving the Swedish Embassy and the Japanese Foreign Affairs Office, and *I am not going to offer them necessarily as proof of the contents thereof*, but I am going to offer them to establish that some years prior to the negotiations between the defendants and the plaintiffs A. B. Addo were confronted with a copying of their adding machine by Japanese people." (emphasis added.)

To which the Court responded (C.T. p. 38):

"THE COURT: All right, the court will have to rule upon them upon an individual basis, but I think I know the difference between what is hearsay and what is not hearsay, based upon the purpose for which it was offered."

When the letters were offered as Exhibits the following ensued (R.T. pp. 69-70):

"THE COURT: Well, I take it the plaintiff proposes to link up the matter. I take it that this is submitted to show that the plaintiff has not will-

ingly given a license to the Toshiba Company to use the patents for either introduction of the machine in the United States or otherwise.

MR. SHEA: That is right. We would not directly give a license to Toshiba, and we are not going to give it indirectly through Mr. Purer.

* * *

“THE COURT: I have not yet admitted the letters, Mr. Fairfield, *and I am not about to admit letters coming from Lindoteves-Jacoberg as establishment of proof of facts asserted in those letters, but they will be admitted as a basis for action by these people.* Do you understand.” (emphasis added.)

On page 72 of the Reporter’s Transcript the following occurs:

“MR. SHEA: I think this would be an appropriate time.

“I hope the court is clear that *I am not offering these letters as proof of everything that is stated in them at all.* I think I made myself clear on that, but if I didn’t I would like to repeat my position.” (emphasis added.)

When they were received as exhibits the court emphasized its position that they were *not* being received as to its contents:

“In deciding this case I am not going to do it on the basis of facts asserted in any letters.” (R.T. p. 76.)

After reading these exhibits the court again stated that they were hearsay and that he was admitting them (R.T. p. 79):

“For that purpose, for the purpose of showing why the Addo people took what action they did in writing to the Japanese organization, Exhibit 16 will be admitted.”

Thus it is apparent that the Lindoteves-Jacoberg letters were not in evidence for the truth of their contents, and under such circumstances they could not be made the basis of substantial evidence sufficient to support a finding which is based upon the truth of their contents.

That is the point that appellants claim error and that point is not discussed by this Court.

As for authentication, we should like to reiterate that none of the exhibits (Lindoteves-Jacoberg letters) were originals. No evidence was submitted why the originals were not made available and no evidence was offered that they were properly addressed and mailed. A statement by Gunnar Agrell that he saw them before they were mailed is insufficient to establish as a fact that they were actually mailed and received, particularly where the letters were written by Mr. Odervall and not by the witness.

The rule as to authentication is stated in *Continental Baking Co. v. Katz*, (Cal., 1968) 69 C. 2d 512, 525-526 [67 Cal. Rptr. 761; 439 P. 2d 889] as follows:

“We understand that in some legal systems it is assumed that documents are what they purport to be, unless shown to be otherwise. With us it is the other way around. Generally speaking, documents must be authenticated in some fashion before they are admissible in evidence. This was true at the time of the hearing in this case and it is true under the Evidence Code (Sec. 1400 et seq.) although the code in many instances eases the former requirements. In the case at bar the court simply took counsel’s word for it that he could have a witness lay the necessary foundation and that he, the attorney, had obtained the documents from the general counsel of Continental so that they were ‘business records under the liberal interpretation.’

“While we have just as much faith in counsel’s sincerity as the trial court evidently had, such faith does not take the place of testimony or judicial notice.

“The reception of the documents in evidence was therefore erroneous.”

Although a reply letter is deemed authenticated as such this is true only when it has been established that the original letter was actually mailed and that its contents called for an answer. In the present cause not only does this count not state any facts in its opinion establishing that the letters were properly addressed and deposited in a mail box but ignores the fact that the presumption of receipt from proper mailing is applicable only to mailing in the United States and not in some foreign nation. (Ap. Op. Br. pp. 40-41.)

APPENDIX D

(R.T. pp. 297-298)

“Q. And you remember in your conversation that Mr. Purer discussed the 4001 machine?

“A. I don’t remember if he referred to that particular number, but he did refer to the Toshiba machine, what I call the Toshiba machine.

“Q. I was under the impression on your direct examination you stated that Mr. Purer referred to the BC4001 machine.

“A. Or the 7001 machine.

“Q. Which one was it?

“A. They are the same.

“Q. Which machine did Mr. Purer refer to in his conversation is what I am trying to find out?

“A. He referred to the machine that was imported.

“Q. Did he mention the number?

“A. No. I used the number to identify the machine as such.

“Q. Well, then, he did not state to you that he had seen the BC4001, is that correct?

“A. He stated that he had seen the machine.

“Q. But not the BC4001.

“A. Well, I wouldn’t recall that, if he used the number or not.

“Q. All right. Now, you also recall that he did use the word “Toshiba”?

“A. I used the word “Toshiba”.

“Q. Well, how about Mr. Purer? Did he use the word “Toshiba”?

“A. He probably did or didn't. To me Toshiba and Tokyo Electric were the same thing at that time.”

APPENDIX E

Since the question of fraud in this cause was to be determined by California Standards, this court should have reviewed all of the evidence in this cause to determine whether the appellees have sustained their burden of proof by establishing the fraud of appellants *by clear and convincing evidence*.

In *People v. Caruso*, 68 C. 2d 183; 65 Cal. Rptr. 336, 436; P. 2d 336, the court stated on page 190:

“the phrase ‘clear and convincing evidence’ has been defined as ‘clear, explicit and unequivocal, so clear as to leave no substantial doubt’ and ‘sufficiently strong to demand the unhesitating assent of every reasonable mind.’ ”

This court, however, concluded that on the doctrine of *Randall Foundation, Inc. v. Riddell*, 244 F. 2d 803, 805 (9th cir., 1957) and *Lundgren v. Freeman*, 307 F. 2d 104, 113-115 (9th cir., 1962) it had no power to review the documents so as to come to a conclusion contrary to that reached by the trial court (although *Lundgren v. Freeman* on pp. 114-115 does refer to several 9th circuit decisions where the appellate court did review documentary evidence).

However, the appellate court should have reviewed all of the evidence to determine if a finding as to fraud is supported by clear and convincing evidence — not substantial evidence.

APPENDIX F

1. *Pursche v. Atlas Scraper Engineering Co.* (9th cir., 1962) 300 Fed. 2d 467. This case does not hold that cancellation of a licensing agreement constitutes unfair competition. The case merely held that the use of a patented invention after the termination of a licensing agreement gives the federal court jurisdiction of a cause of action for unfair competition (*Pursche v. Atlas Scraper Engineering Co.*, p. 483.)

In *Upjohn Co. v. Schwartz* (2nd cir., 1957) 246 Fed. 2d 254, druggists and pharmacists actually took the stand and testified as to the intent of the defendant. It is respectfully submitted that the letters from the dealers admitted by the court over objection, and which this court in its opinion states were not in evidence for the truth of the matters stated therein (Op. p. 5) is not the same as direct testimony.

In *Stork Restaurant v. Sahati* (9th cir., 1948) several factors were present which are not in the present case either by way of evidence or findings. The court found that

a. The Stork Club is a trade name that can be described as art, fanciful, strange and truly arbitrary (p. 55).

b. Plaintiff established through evidence that the Stork Club was associated by the public with the

plaintiff. There was no such finding made in the present case.

c. The court held that because the public could be deceived between the similarity of defendant's use of the same name and insignia as the plaintiff, plaintiff was entitled to an injunction. There was no such finding in this case.

In *Hanson v. Triangle Publications* (8th cir., 1947) the court made specific findings that plaintiff's use of the trademark "Seventeen" had acquired a secondary meaning in the public mind; and associated a relationship between the plaintiff's magazine and any goods or apparel (p. 77). The court also found that the public could be confused believing that defendant's product was associated with plaintiff's magazine.

No such findings were present in this case.

d. *Ford Motor Co. v. Benjamin E. Boone, Inc.*, (9th cir., 1917) 244 Fed. 335 was a pleading case. In its complaint plaintiff alleged that defendant falsely represented itself as an agent of plaintiff, that it purchased plaintiff's vehicles elsewhere and sold it to the public at a discount. The appeal was taken from a judgment entered on an order dismissing the complaint.

The appellate court reversed stating that the complaint stated a cause of action and as to that there is no dispute. But a valid complaint does not give rise to a judgment without proof to sustain the allegations. Plaintiff is not entitled to a judgment based on its complaint alone.

e. *Volkswagon Works G.m.b.H. v. Frank* (Dist. Colo., 1961) 198 Fed. Supp. 916. This was a proceeding for a temporary injunction. However in granting the temporary injunction the court found (pp. 918-919) that the evidence offered by plaintiffs consisted of testimony of purchasers of Volkswagons from the defendant and that in such instances the purchaser had discussions with the defendant in the course of which the defendant gave assurance of his authority to deal in the Volkswagons.

There are no such findings in this cause.

Moreover, the conclusions of the trial court which this court affirmed, namely,

“ . . . that appellants importation and sale of adding machines incorporating Addo's patented inventions, after rescission of the patent license agreement on July 22, 1965, and their advertisement and representation of the connection between the TEC 7001 and Addo, constituted unfair competition.” (Opinion p. 8.)

is directly contrary to the holding of this court in *Intricate Metal Products, Inc., v. Schneider*, 9th cir., 1963 324 F. 2d 555, where the court stated on page 562:

“Intricate contends that there is nothing in the record from which the district court could have found *customer* confusion; that the similarity in appearance of the accused device and that manufactured by Signal does not suffice. We agree.” (emphasis added.)

N O. 2 2 2 4 6

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

APR 1 1969

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APPELLEE'S BRIEF

I

STATEMENT OF THE ISSUES

Appellant's Opening Brief raises the following issues:

1. Was there probable cause for the arrest of appellant for lobster poaching and/or the search which revealed the marihuana?
2. Was there in fact an arrest so that the search could be justified as being incident?
 - a. When confronted by the game wardens was the appellant taken into custody (i. e. arrested) or was he merely detained?
 - b. Assuming that he was taken into custody did

the failure of the officers to strictly comply with the California statutory arrest procedure invalidate the arrest, and, therefore, the search?

3. Was the search, which revealed the marihuana, a valid search?
 - a. Was it incident to the arrest of the appellant?
 - b. Assuming that the search was not made incident to an arrest could it be justified on the basis of the "exigent circumstances" doctrine?
 - c. Would the fact that California Fish and Game Wardens are given statutory authority to inspect containers for illegal lobster validate the search?

II

STATEMENT OF FACTS

Because the issues on appeal in the instant case are grounded heavily in the events of October 4, 1966, the date of appellant's arrest, the Government finds it necessary to render a rather elaborate factual statement.

California Fish and Game Warden Joseph B. DuPont was the initial arresting officer and the Government's primary witness during the hearing on the motions. Warden DuPont testified that

he had been a warden for approximately three and one-half years (Reporter's Transcript, p. 105). ^{1/} He was a man who was conversant with lobster fishing techniques (R. T. p. 161), and his responsibilities as a warden included the enforcement of lobster regulations (R. T. p. 107). He had had experience with fishermen illegally taking and possessing lobsters out of season (lobster poaching) (R. T. p. 107), and, in fact, had made so many arrests for lobster poaching that he "couldn't even begin to elaborate on that." (R. T. p. 145). He was familiar with the fact that lobster poaching is a profitable enterprise and is frequently engaged in prior to the opening of lobster season (R. T. p. 107). DuPont knew that there had been at least three arrests for lobster poaching at Paradise Cove, California, and he had been involved in one of them (R. T. pp. 108, 140). During some of the arrests he had made, the poachers were carrying lobsters in duffle bags (R. T. p. 164).

During the evening hours of October 4, 1966, Warden DuPont, his partner, and another passenger were cruising in a Fish and Game vehicle on the Pacific Coast Highway, near Malibu, California (R. T. p. 105). They were patrolling that night specifically for lobster poachers since the next day (starting at 12:01 A.M.) was the beginning of lobster season (R. T. pp. 106, 107). It was recognized by the warden that lobster poachers, who had taken the lobsters prior to the opening of the season, would

^{1/} Hereinafter abbreviated as "RT".

attempt to bring their illegal catches in early so they would be first to market (R. T. p. 107).

At approximately 11:30 P. M. (R. T. p. 109) Warden DuPont and his companions drove their patrol vehicle into the area surrounding Paradise Cove, California (R. T. p. 108). The evening was rather cool (R. T. p. 115), and extremely quiet (R. T. p. 123), and the two wardens parked their vehicle at the foot of the Paradise Cove pier which jutted into the Pacific before them (R. T. p. 108). Glancing in a southerly direction, Warden DuPont noticed a sport fishing vessel "right in the breaker line almost on the beach" (R. T. p. 108). The warden observed that "it had no lights on it whatsoever, and it was in an unusual position in that the breakers were breaking right underneath the boat, and it was extremely close to shore" (R. T. p. 109), in a most hazardous position (R. T. pp. 113, 125). Furthermore, the stern was facing the beach, again, a rather unusual position for a boat so close to shore (R. T. p. 109). Occasionally, the engine would be started on the boat, apparently to "keep it off the beach" (R. T. p. 113).

Warden DuPont began to observe this oddly situated vessel through binoculars (R. T. p. 112), and he saw "people moving around on the boat" (R. T. p. 113). He could also see "people swimming in the water between the boat and the shoreline, "but he could not estimate how many" (R. T. p. 115).

Their curiosity aroused, the wardens returned to their patrol vehicle and drove back to the Pacific Coast Highway (R. T. p. 116). Eventually, they found an access road and drove down

to a location close to the wallowing boat (R. T. pp. 116-117).

Upon reaching this location, the wardens observed activity both on the beach and the boat (R. T. p. 117). They saw three individuals on the beach (R. T. p. 117), and a raft commuting from the boat to the shore (R. T. p. 118). The raft would be loaded from the boat with large bags, and, then, would ply the distance between boat and beach (R. T. p. 118). Upon reaching shore, the raft would be unloaded and the large bags piled on the sand (R. T. p. 118) approximately seventy-five feet from the wardens (R. T. p. 160). The wardens observed four or five such trips (R. T. p. 119), and that there were a number of bags piled before them (but not an unusual number for a large catch of lobster (R. T. p. 161)).

After the raft had made its last trip, one of the individuals on the beach was heard to say "That's all of them," (R. T. p. 119), and two of the individuals began to carry bags up a stairway which ran from the beach to the clifftop (R. T. p. 119).

After the two individuals had departed, Warden DuPont sprang from his hiding place, ran toward the individual still standing on the beach, identified himself as a State Fish and Game Warden, and flashed his light on his badge (R. T. p. 121). Upon reaching the individual, DuPont found appellant standing shirtless, in soaking wet pants (R. T. p. 124), with a duffle bag in his hand (R. T. p. 163). Immediately, the other two individuals, who had now reached the top of the ridge with their bags, began to run in a direction other than toward the wardens (R. T. p. 121). The

appellant was asked what he was doing and he replied, "We are just bringing stuff ashore." (R. T. p. 122). In the meantime, DuPont's partner had begun to yell at the boat "State Officers", and they both flashed their lights on the vessel revealing the name "Todo-Mio" (R. T. p. 122). The boat immediately "got underway" and headed straight out of Paradise Cove running with no lights (R. T. p. 123).

With suspects fleeing in every direction, Warden DuPont told his partner to watch appellant (R. T. p. 124), since he was now firmly convinced that appellant was involved in taking lobster illegally in violation of California Fish and Game Code, §§8250, 8251 (R. T. pp. 124, 125, 150).

Leaving the appellant in the custody of his partner the warden ran up the stairs previously ascended by the two other suspects (R. T. p. 124). At the top of the cliff he found a station wagon standing with its tailgate open (R. T. p. 126). Upon this open tailgate, there lay a duffle bag similar to the ones on the beach and the one that the appellant was clutching (R. T. pp. 126, 146). The warden opened the bag and found, not spiny lobsters (species *Panulirus Interruptus*), but, instead, a leafy green substance resembling marihuana, wrapped in plastic (R. T. pp. 127-128, 146).

After making this observation, the warden ran along a road in pursuit of the fleeing suspects following two sets of damp footprints for a quarter mile (R. T. p. 128). Finding a camper truck (R. T. p. 129), he peeked inside its cab and saw a duffle

bag, similar to the ones seen before that evening, resting on the front seat (R. T. p. 130). He also noticed a note on the turn indicator (R. T. p. 130) which read "Jeff. Important. Get a hold of Duncan as soon as possible. Raft will be in back of station wagon. I will be back at 11:30 P.M., key to truck on visor. Tonight. Pete." (Emphasis added)(R. T. p. 132).

Reaching inside the cab the warden took the ignition keys (R. T. p. 132). He then trotted back down the road and found that his partner and appellant were standing by the station wagon dutifully awaiting his return. He told his partner what he had found and told him to advise the appellant of his constitutional rights and place him under arrest for a new offense, that of violation of state narcotics laws (R. T. p. 132).

III

ARGUMENT

A. INTRODUCTION

The appellant has chosen to divide his brief into four sections each discussing a separate aspect of his appeal. However, the Government has endeavored to consolidate two of these points into one, and, therefore, its brief will only have three main sections.

The first section of the Government's brief will deal with probable cause both for the arrest and/or the search which

revealed the marihuana. The second section will be directed at whether the appellant was arrested when the fish and game wardens restrained him on the beach. The third section will deal with the propriety of the search itself.

B. CONSIDERING ALL THE FACTS AND CIRCUM-
STANCES, THERE WAS PROBABLE CAUSE
FOR AN ARREST OF APPELLANT, AND/OR
A SEARCH

The appellant has raised two probable cause issues. The first deals with whether there was sufficient probable cause to arrest him for the crime of lobster poaching, because he feels that if there were not, then the search incident to the arrest would be invalidated and the motion to suppress should have been granted. The second assumes that there was no arrest of the appellant, and then takes the tack that there was no probable cause for a search prior to the arrest of appellant for violation of California narcotics laws. Since the same facts and circumstances would generate probable cause in either case, the Government has chosen to treat the probable cause issues as one, with the thought that this Court can view the arrest probable cause and the search probable cause through the same legal lense.

California Fish and Game Wardens are given the authority as peace officers to arrest persons under California Fish and Game Code §§851 and 856. The penalty for violations of California Fish and Game Code §8251 (taking lobster out of season), and

§2002 (possession of illegally taken lobster), is a misdemeanor. California Fish and Game Code §1200. Under §836 of the California Penal Code, peace officers are given the authority to make an arrest without a warrant "whenever he has reasonable cause to believe that the person to be arrested has committed a public offense (i. e. misdemeanor) in his presence."

Therefore, the probable cause issues narrow down to simply this; what facts and circumstances would generate sufficient probable cause for a California Fish and Game Warden to make an arrest and/or search in a lobster poaching situation occurring his presence.

The general rule concerning probable cause has been frequently enunciated by the Supreme Court. Probable cause exists if the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed. Carrol v. United States, 267 U.S. 132, 162 (1925); Henry v. United States, 361 U.S. 98, 102 (1959). Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest was made, the officer had probable cause to make it -- whether at that moment the facts and circumstances within his knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense. Beck v. Ohio, 379 U.S. 89, 91 (1964).

It would not be going too far to say that this is an excellent case in which to apply the rationale that the facts and circumstances

surrounding the events of October 4, 1966 were more than sufficient in the eyes of an expert peace officer since Warden DuPont and his partner were specialists trained to look for lobster poachers. In such a case their eyes are able to detect more than the average person, and probable cause for them is of a little different nature. See People v. Gill, 248 Cal. App. 2d 189, 56 Cal. Rptr. 88 (1967); Ellis v. United States, 264 F. 2d 372 (D. C. C. Cir. 1959); cert denied, 359 U. S. 998, 79 S. Ct. 1129.

Because of the rarity of the subject matter, there are not an overwhelming number of cases dealing with probable cause for game warden arrests or searches. However, the court's attention is respectfully drawn to the following cases gleaned from the state reports. State v. Putzke, 7 Ohio App. 18, 218 N. W. 2d 627 (1966); State v. Krogness, 238 Ore. 135, 388 P. 2d 120 (1963), cert denied 377 U. S. 992; Phillips v. State, 159 Tex. Cr. R. 286, 263 S. W. 2d 159 (1953); State v. Engles, 2 N. J. Super. 126, 64 A. 2d 897 (1949); State v. Evans, 22 P. 2d 496 (1933); State v. Leadbetter, 246 N. W. 443 (1933).

The appellant cites many cases that support his proposition that mere suspicion is not enough to justify an arrest and/or a search, and the Government has no quarrel with that. However, the Government would submit that the circumstances go far, far beyond suspicion. On that chilly night in October of 1966 probable cause was rampant on the beach at Paradise Cove.

Consider the situation as set forth in the Government's statement of facts. October 4, 1966 was the day before lobster

season officially opened. It was known that lobster poachers frequently take lobster before the official opening and transport them to market early so that they can receive the best prices. California game wardens had been alerted to this, and the fact that lobster poachers might be bringing in their catches in the evening hours of October 4. Warden DuPont and his partner were assigned the task of watching for lobster poachers. DuPont had made so many lobster poaching arrests, one at Paradise Cove, that he couldn't begin to estimate the number. He had made arrests of persons carrying illegal lobsters in duffle bags. As the wardens drove their automobile up to the pier at Paradise Cove they observed a sport fishing craft, not at the dock as would be customary, but down the coast in a southerly direction. The craft had no lights visible, was dangerously near the shore, with its stern facing toward the beach. After observing the boat for a time, the wardens observed people moving about on it, and people actually swimming in the chilly October waters of the Pacific between the craft and shore. Moving closer, for a better look, the wardens observed that a raft was commuting between the boat and the shore, loaded with duffle bags. They saw three men speaking in low voices at the shore line and stacking the bags on the sand. It was estimated that the time these events occurred was between 11:30 P. M. and midnight.

After watching the last duffle bag being brought ashore, the wardens ran from their hiding place and identified themselves. Immediately, two of the individuals with appellant began to run,

and the boat sped away running with no lights.

In summary, the facts and circumstances observed by the wardens, heaped one upon the other, clearly indicated to them that the appellant was committing the crime of lobster poaching. The trial court's reasoning in this regard is found at pages 244-45 of the Reporter's Transcript and is cogent and to the point. The facts of the instant case clearly demonstrate that there was probable cause. It was late at night; the day before lobster season opened; the boat was unloading in an unconventional manner in a dangerous position; lobster poachers frequently conduct operations prior to the official season; the bags used were of a type used before and could be used to conceal illegally taken lobster; when identification was tendered by the wardens everyone except the appellant began to run. Nowhere in the above cited fish and game cases is there anything to match the number of facts and circumstances that generate the probable cause in this case.

In State v. Putzke, supra, fish and game wardens were inspecting for undersized fish. They observed the defendant's boat docked next to his processing plant, but the motor was still running. Also, when the wardens approached an individual ran around a corner. The Court held that because of the circumstances there was probable cause for an inspection and arrest.

In State v. Krogness, supra, the defendant's motor vehicle was stopped for a traffic violation and a rifle with a telescopic sight was observed in the back seat. The defendant was a known

petty hoodlum. A search of the trunk of the automobile revealed burglary tools and the defendant's subsequent conviction for burglary was upheld because the court felt that the arresting office had probable cause to believe that a fish and game violation had occurred.

In Phillips v. State, supra, an automobile was observed by wardens being driven along a road at midnight. They followed the car, observed a spotlight being shined upon some deer, and saw a rifle flash. A deer was never seen to fall. After the wardens approached the defendant, he sped away in his automobile. The defendant was followed and arrested. A search revealed the carcass of a deer in the trunk of the defendant's automobile. Held probable cause for arrest and search.

In State v. Evans, supra, a warden was informed that the defendants had obtained a fire permit. Apparently, it was obtained while elk were out of season. The warden hiked through the area in which the defendant represented he would be and came upon the defendant and a companion with mules, gunny sacks and blood stained shirts. The defendant told a conflicting story about the location of his camp and when the warden did find the camp he found the defendant sitting with a rifle across his lap. With nothing more the court held that the warden had probable cause to arrest the defendant and search his camp and the surrounding woods for the illegally slain elk which were eventually found.

Finally, in State v. Leadbetter, supra, game wardens were patrolling on a snowy day in January. They saw tire tracks

heading in the direction of a nearby trout pond. It was not the season for ice fishing so the wardens investigated and saw a stalled automobile, and the defendant walking away from the pond with an ice chisel over his shoulder. The court held that there was enough probable cause to arrest the defendant and search his automobile, such search revealing illegally caught trout.

In conclusion, the Government would submit that when one considers the general principles relative to probable cause, the cases which deal with probable cause in fish and game arrests and searches, and the facts and circumstances of the instant case, there is no conclusion other than there was more than sufficient probable cause in the evening of October 4, 1966 to arrest the appellant for lobster poaching and/or search the duffle bag.

C. UNDER THE CIRCUMSTANCES THE ACTS OF
 THE GAME WARDENS, IN FACT AND IN LAW,
 CONSTITUTED AN ARREST OF APPELLANT,
 AND, THEREFORE, THE SEARCH INCIDENT
 THERETO WAS VALID

The appellant seems to be arguing throughout his brief in the alternative in that in Section I he concedes that he was arrested but argues that there was no probable cause. However, in Section II of his brief he argues (1) that there was no arrest, but merely a detention and/or (2) even if there was more than a detention, the wardens did not comply with California arrest statutes, and, therefore, the arrest was invalid. He then argues,

that since there was no arrest, the arrest was invalid.

1. Appellant was arrested when restrained by the wardens on the beach.

The appellant contends that the initial confrontation by the wardens was merely a detention, rather than an arrest, and he has gone to great lengths to detail the law in the area of detentions versus arrests.

The Government would submit, however, that the stopping here was not a detention for questioning, but an arrest, and this is clearly demonstrated by the facts and circumstances. There may have been an initial detention, but as the situation evolved, the appellant was reduced to custody when Warden DuPont instructed his partner to watch appellant while he went to look for the fleeing suspects.

The Government, before detailing its argument, will set forth briefly a discussion of the law in this particular area of arrest.

The Supreme Court has held that the law of the state where an arrest without a warrant takes place determines the validity of the arrest. United States v. Di Re, 332 U.S. 581, 68 S.Ct. 22 (1948). This Court has construed California arrest statutes in the past. Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966); Morales v. United States, 344 F.2d 846 (9th Cir. 1965).

As stated above in appellee's section "B", California game wardens have the authority to arrest as peace officers. Therefore, their authority and guidance as to arrests is taken

from the California Penal Code as defined in §§834 and 835 of that volume.

Section 834 of the California Penal Code states in pertinent part as follows:

"An arrest is taking a person into custody, in a case and in the manner authorized by law."

Section 835 of the California Penal Code states in pertinent part as follows:

"An arrest is made by an actual restraint of the person, or by a submission to the custody of an officer." (Emphasis added).

This last section is directly in line with the Supreme Court's ruling in Henry v. United States, 361 U.S. 98, 103, 80 S.Ct. 108 (1959), in which the Court held that when officers interrupt the movement of a defendant and restrict his liberty of movement an arrest is complete.

In relation to the theory that arrest is synonymous with custody, the California Supreme Court has defined "custody" as occurring if the suspect is physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived. People v. Arnold, 66 Cal.2d 438, 448, 58 Cal.Rptr. 115, 426 P.2d 515 (1967). Furthermore, a California court has stated that:

"A temporary detention may be akin to an arrest inasmuch as during the time of such detention, the person detained, if he is physically deprived of

his freedom of action in any significant way, can be considered to be in custody." People v. Villareal, 68 Cal. Rptr. 610, 262 A. C. A. 442 (1968).

It must be noted that the facts of the Villareal case, supra, at least as far as the initial stopping of the defendant is concerned, are very close to the facts of the instant case. There, a police officer saw a potential defendant, flashed his light on his badge, identified himself as a police officer, and asked the defendant to identify himself. After the defendant told the officer to "go to hell" he was placed against a wall. The court held that this detention constituted custody and was akin to an arrest.

With the above cited statutes and cases in mind, it is now incumbent upon this Court to survey the facts of the instant case to see if the defendant was in fact arrested when the wardens confronted him on the beach.

The facts reveal that when Warden DuPont sprang from his hiding place he identified himself as a game warden and flashed his light upon his badge. The wardens also yelled "State Officers" at the boat. Suddenly, the situation began to unravel, because two of the suspects on the cliff began to run, and the boat got underway heading straight out to sea. Warden DuPont instructed his partner to watch the appellant while he went to the top of the cliff to locate the other suspects. It was at this point that the appellant was reduced to custody. He stood there in his soaking wet pants with a duffle bag in his hands. He was not going

anywhere, and he knew it. Later, he accompanied his custodian to the top of the cliff and dutifully waited the return of DuPont. His liberty and movement were as restrained as they could be.

The appellant was actually restrained, his movement was interrupted and his liberty restricted. He was physically deprived of his freedom of action in a significant way, and he was led to believe that he was so deprived. In short, the appellant was in custody (i. e. under arrest). Therefore, there could be a search incident to this arrest, and, in fact there was such a search.

Appellant in Section II of his brief occasionally makes the argument that he was not arrested since the wardens had no intent to arrest him on the beach, and this intent is evidenced by the fact that they "rearrested" him for the narcotics violations. The Government would simply answer this contention by saying that there is nothing wrong with arresting someone twice if two separate offenses have been committed. Warden DuPont testified that he normally would arrest someone again, having previously arrested him, if the second offense were more serious (R. T. p. 170). In fact, he testified that he was required to do so, although the expressed authority was not mentioned (R. T. p. 170). To say that the procedure of placing a person under arrest for another crime indicates that the arresting officer did not have the intent to arrest initially; is absurd.

The Government submits that the appellant was arrested initially on the beach, and, therefore, the search which produced the marihuana was a valid one being incident to the arrest.

2. The appellant's arrest did comport with the California arrest statutes and was valid.

In the second part of Section II of his brief, the appellant is apparently asserting that even if he was arrested under the common-law definition, the wardens did not comply with the California statutory requirements for a proper arrest, and therefore, the arrest was invalid. If the arrest was invalid, the appellant feels that the search would also have to be invalid.

The arrest statute referred to by appellant is California Penal Code, §841 which reads as follows:

"The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense." (Emphasis added)

The appellant would have this Court apply the first part of this statute to invalidate the arrest. However, there are exceptions to the formal procedure outlined, one of which is built directly into the section (this exception was recognized by this Court in Ward v. United States, 316 F.2d 113 (9th Cir. 1963), cert denied 375 U.S. 862, 84 S.Ct. 132). Another exception to this formal procedure for arrests has been recognized. If there are "exigent circumstances", such as the possibility that evidence

might be destroyed, then peace officers are excused from going through the statutory routine. See People v. Maddox, 46 Cal. 2d 301, 294 P. 2d 6 (1956); Dagampat v. United States, 352 F. 2d 245 (9th Cir. 1965); Ker v. California, 374 U. S. 23 (1963), Miller v. United States, 357 U. S. 301 (1958).

Both of these exceptions apply in this case because a crime was being committed in the presence of the officers, and there were exigent circumstances which compelled Warden DuPont to make the search. Therefore, the statutory formalities did not have to be complied with, and the search was valid as incident to a lawful arrest.

As to the statutory exception dealing with arrests while the arrestee is engaged in the crime, the appellant would have this Court take the position that the offense of lobster poaching commences and terminates when the crustacean is raised from the watery depths. Not so. The crime continues from the time that the lobster is extracted from its rocky cavern or enters the trap until it is illegally transported to its destination at table, tavern, or market. It is a crime in California both to take lobster out of season (California Fish and Game Code §8251) and to possess such lobster (California Fish and Game Code §2002). Both of these acts constitute the crime of lobster poaching since they are in effect one in the same crime. One cannot take without also possessing, and conversely, one cannot possess without having first taken. Therefore, to say that the appellant was not committing the crime of lobster poaching (or so the wardens

reasonably believed), when the wardens were observing him, is falacious. The wardens felt that he was illegally transporting and possessing lobster that had been illegally taken, and that constitutes lobster poaching.

Thus, a crime was being committed in the presence of the wardens, so they thought, and the statutory exception of §841 applies.

But yet another exception applies here. When the wardens announced themselves, two suspects on the cliff who had been carrying duffle bags began to run. Thus, the wardens could reasonably suspect that evidence would soon be destroyed, and action should be taken immediately to preserve it and apprehend the suspects if possible. This is clearly a case where the exigent circumstances rule would apply, and the formalities of an arrest need not be undertaken. This doctrine will be more fully developed in appellee's Section "C".

Once again, appellant attempts to demonstrate an awareness of the violation of §841 by pointing to the "rearrest" of the appellant. As pointed out before, this rearrest shows nothing except that the officers were performing a reasonable act required of them.

In conclusion, because of the exceptional circumstances surrounding this arrest, the wardens were justified in omitting the statutory formalities and the arrest of the appellant was valid in law.

3. If there is probable cause to make an arrest, violations of California Penal Code, §841 do not invalidate searches incident to the arrest.

The appellant has cited a number of cases dealing with California Penal Code, §841 which is the "knock, announce and enter" arrest statute in California. As is pointed out in appellant's brief violations of this statute have been held as grounds for suppression of evidence. However, the California Supreme Court (Traynor, J.) has stated that violations of §841 have no bearing upon a search incident to an otherwise valid arrest. In People v. Maddox, supra, the court stated:

"If the officer has reasonable cause to make an arrest, a violation of §841 would be unrelated and collateral to the securing of evidence by a search incident to the arrest, for what the search turns up will in no way depend on whether the officer informed 'the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it.' "

See also People v. Ruiz, 196 Cal. App. 2d 695, 16 Cal. Rptr. 855 (1961).

The cases dealing with §841 can clearly be distinguished from the reasoning surrounding §841. When officers violate §844 they are entering a dwelling in an unreasonable manner, something which is clearly prohibited by the Constitution. However,

violations of §841 have no basis in Constitutional rights since the Constitution does not delineate any manner in which arrests should be made. A violation of §841 is merely the violation of a statute with no other rights appended.

Therefore, it would appear that whether or not the wardens complied with the formal arrest routine, at least, as far as §841 is concerned, is quite irrelevant when considering the validity of a search incident to the arrest otherwise valid. If there was probable cause for the arrest, such having been previously established by the Government, then a search incident to the arrest does not depend on the formalities of §841 for its validity.

4. Conclusion.

In conclusion the Government would submit that there was in fact a valid arrest of appellant when he was reduced to the custody of the warden on the beach. Furthermore, because of the circumstances, the wardens did not have to comply with the formal requirements of §841 of the California Penal Code since both a statutory and case law exceptions apply here. Therefore, the arrest did comport with the law of California. Finally, the search incident to the arrest may not depend on the rendition of the formal routine by the wardens if the arrest was otherwise valid.

Therefore, there was a valid arrest of the appellant, and any search was also valid as incident to it.

D. THE SEARCH WHICH PRODUCED THE
MARIHUANA, USED AS EVIDENCE AGAINST
APPELLANT, WAS VALID UNDER A NUMBER
OF THEORIES

The real heart of the appellant's dispute with the Government is that there was a search by Warden DuPont (for lobster) which produced a duffle bag filled with marihuana. In addition to the reasons alluded to above, the Government submits that the search is readily justified on a number of grounds.

The situation here involves the search of an automobile since the duffle bag was found on the tailgate of the station wagon parked at the top of the cliff. Therefore, the Court's attention must be directed toward this area of the law which differs in part from the normal law of search and seizure.

The courts have held that there are two instances where the search of an automobile without a warrant may be justified. There may be a search incident to a valid arrest, or if the search is conducted apart from the arrest it may be justified by the doctrine of "exigent circumstances". Also, in California, Fish and Game Wardens may make inspections for illegally taken lobster and this could be used to validate the search.

1. The search was made incident to the arrest of appellant.

Since the Government contends that the appellant was arrested when he was reduced to the custody of the wardens, the most logical way to justify the search is to say that it was incident

to the arrest. Search incident to a lawful arrest is a practice of ancient origin and has long been an integral part of the law enforcement procedures of the United States. Harris v. United States, 331 U.S. 145, 150 (1947).

At least since the pronouncement of Carroll v. United States, supra, at page 151, an automobile may be searched without a warrant if incident to an arrest. Furthermore, both California and Federal courts have held that an automobile not occupied by the arrestee at the time of the arrest may be searched incident even if some considerable distance intervenes between the arrest site and the location of the vehicle. Rhodes v. United States, 224 F.2d 348 (5th Cir. 1955) (100 yards); United States v. Fortier, 207 F.Supp. 516 (D.C. Conn. 1962) (250 feet); People v. Williams, 67 Cal.2d 226, 60 Cal.Rptr. 472, 430 P.2d 30 (1967) (one block); People v. Dailey, 157 Cal.App.2d 649, 321 P.2d 469 (1958) (50-60 feet).

With the above-cited case law in mind, the Court is respectfully directed to the facts of the instant case. The appellant was taken into custody on the beach at the base of a cliff which could be climbed via a stairway. Immediately thereafter, Warden DuPont ran up the stairs, and found a station wagon with a duffle bag resting on the rear tailgate. The bag was similar to the one that the appellant was carrying and the ones on the beach. The warden paused briefly in his pursuit, and opened the bag wherein he found the marihuana.

Clearly, this was a search incident to the arrest of

appellant. It took place some distance from the site of the arrest, but not more than a few minutes had passed. The bag was of the same type as those on the beach.

2. Under California law, a search of a motor vehicle if substantially contemporaneous, may be incident to a subsequent arrest.

Interestingly enough, the California Supreme Court has held that a search of a motor vehicle may be incident to a subsequent arrest if the two events were substantially contemporaneous. The fact that the search occurred first in time does not render it unlawful. People v. Williams, supra, page 229. In that case a burglar abandoned his automobile after "spinning out", and the police searched it fifteen to twenty minutes before the defendant was apprehended.

Therefore, if one assumes for the sake of argument that the initial arrest of appellant was invalid, the search can still be validated as incident to an arrest under the doctrine of the Williams case. There was clearly probable cause for a search here, and the fact that the marihuana arrest took place afterwards may not invalidate it. It could be said that the search was incident to the subsequent arrest for narcotics violations, rather than incident to the arrest for the lobster poaching.

3. Even if the search cannot be found incident to any arrest it was still a valid search under the doctrine of "exigent circumstances".

The appellant in Section IV of his brief makes the bald

assertion that "there were no exceptional circumstances to justify the search made by one of the wardens in the manner which and at the time it occurred". (page 37). The Government would take issue with that statement, and contends that there were exceptional circumstances, and the search falls directly within the doctrine of "exigent circumstances".

This doctrine, briefly stated, is that under some circumstances peace officers are justified in making a search without a warrant in order to preserve evidence, apprehend suspects, etc. This doctrine may be applied to situations occurring before or after arrests.

The Government will first discuss what the law is in this area giving attention to searches before and after an arrest. Then the circumstances will be discussed which the Government feels rise to the level of "exigent circumstances".

Generally speaking, the Supreme Court first gave voice to this doctrine, in relation to automobile searches, in Carroll v. United States, supra, at page 151 when it stated:

"[There is a] difference as to necessity between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods . . . concealed in a movable vessel where they readily could be put out of reach of a search warrant."

The Court has also stated in Preston v. United States, 376 U.S. 364, 366 (1964) that:

"Questions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses.

"What may be an unreasonable search of a house may be reasonable in the case of a motorcar."

In regard to searches under exigent circumstances which occur after an arrest, this Court has generally stated in Boyden v. United States, 363 F.2d 551, 553 (9th Cir. 1966):

"[It is the] right and duty on part of an arresting officer to seize the fruits of the crime and the instruments of the crime as evidence, at the time of arrest, if his leaving them unseized would create a danger that they would be destroyed."

Further, this Court has stated in Travis v. United States, 362 F.2d 477, 480-81, fn. 3, (9th Cir. 1966):

"Where it is not practicable to secure a warrant to search a vehicle for contraband goods because the vehicle can be quickly removed out of the locality or jurisdiction, the vehicle may be searched by a proper official then having probable cause to believe that the vehicle contains such goods."

The same type of thinking is shared by the California Supreme Court. See People v. Webb, 66 Cal. 2d 107, 56 Cal. Rptr. 902, 424 P. 2d 342 (1967) (In bank).

There have also been cases which apply the doctrine of exigent circumstances to situations where the search takes place prior to any arrest. This Court has said in Cipres v. United States, 343 F. 2d 95, 98, 99 fn. 9 (9th Cir. 1965):

"A prior search may be valid as incident to a substantially contemporaneous arrest without a warrant, if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure.

"The 'exigent circumstances' exception to the general rule requiring a search warrant is independent of that permitting a warrantless search incident to a valid arrest (citations), and if applicable it would be immaterial that the arrest followed the search, or that there was no arrest at all. The only relevant inquiry would be whether it was probable that contraband was both present and threatened with imminent removal and destruction."
(Emphasis added.)

Consider also Boyden v United States, supra; Caldwell v.

United States, 338 F.2d 385 (8th Cir. 1964); People v. Williams, supra.

Therefore, it is clear that many times the search of an automobile is justified when the search of a house would not be. Of course, this search must be based on probable cause, but the Government would direct the Court's attention to Section "A" of this brief. It is patently clear that there was probable cause to make a search in this case. The only question that remains is whether, assuming for the sake of argument that there was not a valid arrest, there were sufficient "exigent circumstances" to justify the search. The Government submits that the only answer to this question is, "yes, there were more than sufficient exigent circumstances to justify such a search."

The Government will discuss the "exigent circumstances" for the search generally, however, the Court should consider them (1) in relation to the arrest of the appellant on the beach, and/or (2) assuming there was no arrest on the beach, in relation to the theory that the search was valid in and of itself.

Once again the facts relative to the search are these: the wardens had been observing the defendant and his companions for a period of time. Through their observations the wardens were convinced that the persons watched were bringing in illegal lobsters. After the wardens ran out to the defendant and confronted him with their identification, the situation began to deteriorate. The boat from which the contraband had been unloaded "got underway" and headed straight out to sea. The two individuals who had

carried two bags of contraband up the cliff began to run. The warden, in an attempt to apprehend the fleeing suspects ran after them, and found instead the station wagon with the duffle bag of marihuana on the tailgate. The two suspects were still at large and could have been lurking nearby.

Thus, the warden was confronted with a situation where a number of suspects both in the boat and on land were fleeing. A bag of what he believed to be illegal lobsters was inside an automobile which was parked on the cliff top. He did not know who had the keys to that automobile, and therefore, it would be reasonable to believe that one of the fleeing suspects could return at any moment and drive the automobile with the bag away, or at the very least, hide the bag in a convenient place. The warden checked the bag to confirm his belief that it contained lobsters, because under the reasoning of the above-cited cases it was his right and duty to search the bag because there was a danger that the evidence might be destroyed or removed.

Therefore, the Government submits that even if the search cannot be justified as incident to an arrest, nevertheless, the overwhelming exigent circumstances here justify the search either after the arrest on the beach, or, in and of itself, prior to the narcotics arrest.

3. In addition to the normal justification for a search, California Game Wardens have a statutory right to inspect containers which they suspect contain illegal lobsters.

In addition to the reasons stated above, the search of the

duffle bag can be justified on yet a third ground. California Fish and Game Wardens are authorized by statute to make inspections relative to their duties. At the hearing on the motion to suppress there was a discussion of the right of California Game Wardens to make inspections under §1006(a) of the California Fish and Game Code (R. T. pp. 231-232, 236). The Court's thinking was influenced by this, as part of the justification for denying the motion was based on the inspection right (R. T. p. 246).

California Fish and Game Code §1006(a) reads in pertinent part as follows:

"The Department may inspect the following:

"(a) All boats, markets, stores, and other buildings, except dwellings, and all receptacles, except the clothing actually worn by a person at the time of inspection, where birds, mammals, fish, or amphibia may be stored, placed or held for sale or storage."

The appellant's quarrel with the Government regarding this statute is that he feels the court applied it with a broad brush, and did not use a "reasonableness" standard when considering the possibility of a justified inspection. However, this is just not the case as the Reporter's Transcript reveals.

The court and defense counsel entered into a colloquy concerning the standard applicable when determining whether an inspection under §1006(a) is constitutionally permissible (R. T.

pp. 231-34). The following is a sample of the discussion.

"MR. TARLOW: . . . A Fish and Game Warden is in fact governed by the same probable cause standards as any other person" (R. T. p. 231).

"THE COURT: That may be true. At the same time he isn't governed by the same standards in conducting a search that an ordinary officer is." (R. T. pp. 231-32).

This reasoning of the Court is borne out by the case of Camara v. Municipal Court, 387 U.S. 523 (1967), cited by appellant, which overruled in part the prior decision of Frank v. Maryland, 359 U.S. 360 (1959).

The Court in Camara stated at 387 U.S. 523, 539:

"Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations."

Further, the Court stated at 387 U.S. 523, 536:

"There can be no ready test for determining reasonableness than by balancing the need to search against the invasion which the search entails."

Explaining its reasoning in this regard even further the Court remarked at 387 U.S. 523, 535:

"In determining whether a particular inspection is reasonable, and thus in determining whether there is probable cause . . . for that inspection, the need for the inspection must be weighed in terms of these reasonable goals of code enforcement."

This reasoning was further amplified in the companion case See v. City of Seattle, 387 U.S. 541, 545 (1967):

"The agency's particular demand for access will of course be measured, in terms of probable cause . . . , against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation." (Emphasis added.)

What can be gleaned from the reasoning of these two cases is that there is a little different standard of probable cause in inspection cases. While probable cause is still required, nevertheless, it is perhaps of a lower quality. This was the reasoning of the trial court here, and the Government submits that it was the correct reasoning.

The court stated its reasoning as to §1006(a) at R. T. page 246:

"I think the search, in any event, was valid even though there has not been an arrest, a legal arrest, for the reason that §1006 of the Fish and Game Law

seems to authorize officers acting under that statute to inspect just under such circumstances as existed here, and the type of containers that existed here. " (Emphasis added.)

Therefore, it is clear that while the court perhaps did not apply the usual search and seizure standards of probable cause, nevertheless it did consider the circumstances and apply a probable cause standard to justify the inspection. This inspection standard is supported by the cases cited above.

Thus, the decision whether §1066(a) violates the Constitution need not be made, since the reasoning of the trial court clearly falls within constitutional boundaries.

But, if the Court decides that the regular standard of probable cause is necessary there is more than enough here. As set forth in Section "A" of appellee's brief, the wardens were firmly convinced that appellant had committed violations of the California Fish and Game Code. All of the facts and circumstances on that chilly October evening pointed to exactly that, and there can be no denying that the wardens had just cause to inspect those duffle bags. The inspection was firmly grounded in probable cause, and perfectly legal within the dictates of the California Fish and Game Code and the Fourth Amendment to the Constitution.

4. Conclusion.

In conclusion, the Government submits that the search of the duffle bag resting on the tailgate of the station wagon can be

justified in a number of ways.

1. It was incident to a lawful arrest of the appellant.

2. Even if it were not incident to a lawful arrest, the exigent circumstances demanded that the search be undertaken at the time and in the manner that it was conducted.

3. California Fish and Game Wardens have an inspection right under the Fish and Game Code.

- a. The Court in determining the propriety of this inspection right under the circumstances of this case, applied a valid probable cause standard.
- b. There was more than enough probable cause for an inspection.

FINAL CONCLUSION

In light of the above-cited cases and statutes, the Government respectfully submits that this Court should deny each and every ground stated by appellant on appeal. The motions were properly denied by the trial court and appellant should stand convicted.

Respectfully submitted,

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See Vol. 3458

No. 22049

No. 22049A

In The

UNITED STATES COURT OF APPEALS

MAR 24 1969

For The Ninth Circuit

-S-H PLASTICS, INC.,

Petitioner,

vs.

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Respondent

-S-H PLASTICS, INC.,

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vs.

UNBEAM LIGHTING COMPANY, INC.,

Respondent

PETITION FOR REHEARING

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Respondent)

PETITION FOR REHEARING

At the lower level, Petitioner provided the trial court with proper materials for constructing an injunction but the court failed to properly read the blueprint. In this Court Petitioner found better carpentry, but was rebuffed as having failed to supply the materials required for successful construction. The difficulty is that Respondent, responsible as a materialman for

carrying up the supplies in the form of Findings of Fact, succeeded in preventing the building of anything except error. Nor can Rule 52(a) of the Federal Rules of Civil Procedure be exonerated for its participation in abetting error.

Petitioner seeks rehearing on the ground that application of the law to the established facts demands a result different from that reached by this Court. The sole issue of consequence in this appeal is whether the K-Numbers of Petitioner functioned to identify source. All of the evidence on this issue was summarily considered by this Court in two short paragraphs of the decision. (Slip Opinion, last two paragraphs, pages 5-6). The brevity of discussion was justified by reference to the "clearly erroneous" rule. Petitioner earnestly solicits that the Court reconsider the applicability of this test to the present case.

Findings of Fact are not entitled to the usual presumption of being correct where they have been induced by an erroneous view of the law. Cedillo v. Standard Oil Company of Texas, 291 F.2d 246, 248 (5th Cir. 1963); U.S. v. Singer Mfg. Co., 374 U.S. 174, 194 n.9, 83 S.Ct. 1773, 1784 n.9 (1963). It is obvious that the District Court in this case approved prepared Findings, inconsistent with its expressed determination, because it believed the law flatly precluded Petitioner from acquiring trademark rights. While the opinion of this Court suggests that the observations of the lower court during trial are not binding, it must be equally correct that they cannot be ignored. This is the clear holding in Mershon Company v. Pachmayr, 220 F.2d 879 (9th Cir. 1955).

The Mershon case, similar to the present case, involved a suit for trademark infringement. The mark was a white layer of material in a gun recoil pad comprising multiple layers which the lower court found, "in effect", could not be the subject of a valid trademark. "The findings also were that it is not true that the parties to the action were the only ones to use the white line on a recoil pad." 220 F.2d at 882. On review, this Court quoted the District Court's "remarks during the course of trial" that the two marks would be confusing if the alleged mark could constitute a legally valid trademark. The Court then stated, at page 885:

"Having reviewed the whole record including inspection of exhibits and a study of the court's findings of fact and conclusions of law, we are convinced that the United States District Judge was firmly impressed with the idea that color cannot be a component of a statutory or common law trademark or of unfair trade. And we are convinced that such idea led to the erroneous conclusion that the symbol constituting the trade-mark is not a valid trade-mark."

In the present case, Petitioner has pointed out in its Opening Brief (No. 22049A), at page 20, several clear statements by the lower court, during trial, indicating that the K-Numbers functioned to identify source but could not be the subject of a valid trademark. With this erroneous conception of the law, it would be surprising if the Findings did not reflect error.

In Audio Fidelity, Inc. v. High Fidelity Recordings, Inc.,

... similar result was reached by this

Court in an unfair competition suit. The lower court's determination of facts was disturbed because once the lower court found actual copying, there should have been a presumption of secondary meaning. The District Court, however, found no secondary meaning because it believed that the record jacket was functional. This Court found error in the lower court's understanding of the "functionality" doctrine, and found that the court erred at law in failing to consider the presumption when ruling on secondary meaning. The lower court judgment was reversed and remanded because an error of law had affected the Findings of Fact.

Application of the test of Rule 52(a) clearly presumes that the trial judge carefully reviewed the record making his own determinations of fact and applying the proper law. While preparation of findings and conclusions by counsel is permissible, it has been remarked that acceptance of such findings in haec verba is "undesirable". United States v. Howard, 360 F.2d 373, 378 n.7 (3d Cir. 1966); Lorenz v. General Steel Products Company, 337 F.2d 726, 727 n.3 (5th Cir. 1964). This Court has cautioned that the trial court has a duty to consider, weigh and determine the accuracy of findings. Continental Connector Corp. v. Houston Fearless Corp., 350 F.2d 183, 187 (9th Cir. 1965). And it has been stated that it is not proper to announce a decision and subsequently direct the prevailing party to prepare findings. Roberts v. Ross, 344 F.2d 747, 751 (3d Cir. 1965). Yet in the case at bar, the decision was announced and Respondents prepared findings that were accepted verbatim.

It may be plausible to rationalize that the trial judge was legally educated between the time the incorrect statements were made at trial and the time the findings and conclusions were signed. But where counsel prepared findings that were signed without the slightest change, it is submitted that plausibility has become mere optimism. The error of law did not vanish, it was eclipsed in unreviewed and unanalyzed findings and conclusions carefully prepared by anticipating counsel.

In a situation like the present, this Court has not balked at in-depth review. Findings on likelihood of confusion, an issue which is related to secondary meaning, see Audio Fidelity, Inc. v. High Fidelity Recordings, Inc., 283 F.2d 551 (9th Cir. 1960), as well as findings of secondary meaning itself, have been reversed, because the question or issue "is one for this court to decide." Fleischmann Distilling Corp. v. Maier Brewing Co., 314 F.2d 149, 152 (9th Cir. 1963); Sleeper Lounge Company v. Bell Manufacturing Co., 253 F.2d 720, 723 (9th Cir. 1958); National Van Lines v. Dean, 237 F.2d 688 (9th Cir. 1956); National Lead Company v. Wolfe, 223 F.2d 195, 201 (9th Cir. 1955).

The ostensible basis for affirming the decision that the K-Numbers had not acquired secondary meaning was two-fold: (1) other panel manufacturers used similar symbols and some began using them before Petitioner began using its K-Numbers; and (2) a number of fixture manufacturers testified that the K-Numbers had become a short hand industry expression for a given panel configuration and were used as a part of their lighting fixture catalog numbers. (Slip Opinion, pp. 5-6).

With regard to the former point, the Court noted that no other manufacturers used "K" which was peculiar to K-S-H. The evidence on this fact was undisputed. As for the numeral portion of the marks, only one manufacturer (Rohm & Haas) used the same numeral prior to Petitioner and few manufacturers used the same numeral even at the time of trial. (Plf. Ex. 190). In any event, it is well-settled law that a trademark must be considered in its entirety. Sleeper Lounge Company v. Bell Manufacturing Co., 253 F.2d 720 (9th Cir. 1958). Moreover, this Court has held that mere use by third parties of even an identical mark does not preclude the acquisition of secondary meaning. Fleischmann Distilling Corp. v. Maier Brewing Co., 314 F.2d 149 (9th Cir. 1963); Safeway Stores v. Dunnell, 172 F.2d 649, 654 (9th Cir. 1949). Certainly marks that are similar only because they are alphanumeric do not support a contention of lack of indication of source or origin. Particularly when use of such marks generally came after use by K-S-H.

With respect to the second basis with which the Court supports its conclusion, Petitioner respectfully refers the Court to pages 2 and 3 of its Reply Brief (No. 22049A). This was the most biased testimony that the trial court received. It is not necessary to arrive at this conclusion to weigh the demeanor and credibility of these witnesses. It is unmistakable from the fact that they were customers of Carolite that supplied its panels when K-S-H panels were ordered by K-Numbers. Had Carolite lost the lawsuit, they would have been guilty of palming off. Their interest in the outcome was real--and they testified accordingly.

It is also pointed out that many fixture manufacturers, e.g., Day-Brite, Lighting Products, Inc. and Sunbeam (prior to the existence of Carolite), used the K-Numbers in their catalog designation because they supplied K-S-H panels. Furthermore, they testified at trial that the K-Numbers did indicate source. Two experts testified to the same effect. The president, quotation manager, assistant sales manager and purchasing agent of Defendant Sunbeam agreed. And even Defendant Carolite's own sales manager admitted that a K-Number brings K-S-H to mind.

The evidence overwhelmingly indicates that the trial court was correct during the trial in recognizing the existence of secondary meaning. But for that error of law as to whether trademark rights can be obtained in alphanumeric symbols by usage--justice would be realized. The ulcerated findings should not have been relied upon by this Court.

This Court affirmed because the above-discussed evidence allegedly supported the findings. But the exiguity of such evidence militates against affirmance even under the most stringent application of the clearly erroneous rule. Assuming this rule applies, it has been stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Centennial Insurance Company v. Schneider, 247 F.2d 491, 494 (9th Cir. 1957); Kamen & Co. v. Paul H. Aschkar & Company, 382 F.2d 689, 694 (9th Cir. 1967).

Petitioner submits that a review of the entire evidence will compel a contrary result to that reached by this Court. In finding a lack of source indication, the trial court gave no apparent weight to Plaintiff's extensive use of the K-Numbers over a substantial period of time and across the entire country. The findings do not reflect the widespread and expensive advertising in which K-S-H indulged. Nor does it state that the sales volume of products bearing these symbols was substantial. And notwithstanding Carolite's proved palming off and grant of an injunction in the related situation, and the other conduct of Carolite, there is no suggestion that the court considered bad intent. The findings show that the lower court failed to account for those factors which are normally considered persuasive on the issue of secondary meaning. The findings when read in light of the evidence as a whole, set forth in Petitioner's Opening Brief, pages 4 through 15 (No. 22049A) are "clearly erroneous."

Petitioner requests that in view of the above argument demonstrating that the clearly erroneous rule is inapplicable to the present case, or in light of the inadequacy of the evidence relied upon by this Court to find "substantial support," a rehearing should be granted.

Respectfully submitted,

Owen J. Ooms

Paul E. Adams

Attorneys for Petitioner

CERTIFICATE

I certify that, in my judgment, the foregoing Petition
is well founded and that is is not interposed for delay.

Paul E. Adams

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAR 24 1969

JAMES TINNEY,

Appellant,

vs.

LAWRENCE E. WILSON, Warden,
et al.,

Appellees.

No. 22266

See Vol. 3470

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC

FILED

MAR 14 1969

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PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
IN BANC

1

ARGUMENT

I. THERE WAS PROBABLE CAUSE TO ARREST
APPELLANT FOR AIDING AND ABETTING
THE JUVENILE PROSTITUTES IN THE
COMMISSION OF A VIOLATION OF SUB-
DIVISION (b) OF CALIFORNIA PENAL
CODE SECTION 647 AS WELL AS FOR
CONTRIBUTING TO THEIR DELINQUENCY
IN VIOLATION OF CALIFORNIA PENAL
CODE SECTION 272.

3

II. THE COURT'S ORDER TO THE DISTRICT
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES TINNEY,

Appellant,

vs.

LAWRENCE E. WILSON, Warden,
et al.,

Appellees.

No. 22266

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC

TO THE HONORABLE OLIVER D. HAMLIN, JR., CHARLES M. MERRILL
and WALTER ELY, CIRCUIT JUDGES OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT:

Pursuant to Rules 35(b) and 40 of the Rules for
Appellate Procedure, Title 28, United States Code, appellees,
Lawrence E. Wilson and the People of the State of California,
hereby petition for a rehearing and suggest a rehearing
in banc to reconsider this Court's decision filed in this
case on February 28, 1969.

Upon reading this Court's opinion, we wonder what
remains in this Circuit of the principle announced in Ker v.
California, 374 U.S. 23, 34 (1963), that, consistent with
the fundamental constitutional criteria of the Fourth

Amendment, the states were free to develop "workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States." That principle, recently reiterated in Sibron v. New York, 392 U.S. 40, 60-61 (1968), has surely been substantially emasculated by the decision in this case.

Our petition for rehearing and request for a rehearing in banc is not submitted simply as a routine matter by another disappointed litigant. We emphatically submit that this Court's decision is in error on a fundamental ground. The Court concluded that, under the Fourth Amendment, the Los Angeles vice control officers did not have sufficient grounds to entertain a reasonable belief that appellant was acting in concert with two juvenile prostitutes plying their trade when he was found hiding in the back seat of the car driven by one of them, who by prearrangement was to observe while the other was to commit an act of prostitution. We believe this conclusion is demonstrably erroneous.

Additionally, the Court's apparent conclusion that the marihuana evidence seized in this case must be permanently suppressed, regardless of any other evidence the prosecution may be able to produce upon retrial on the issue of probable cause, is an unwarranted interference with orderly state procedure in the handling of criminal cases.

ARGUMENT

I

THERE WAS PROBABLE CAUSE TO ARREST APPELLANT FOR AIDING AND ABETTING THE JUVENILE PROSTITUTES IN THE COMMISSION OF A VIOLATION OF SUBDIVISION (b) OF CALIFORNIA PENAL CODE SECTION 647 AS WELL AS FOR CONTRIBUTING TO THEIR DELINQUENCY IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 272.

While we consider the Court's conclusion that the "frisk" search of appellant for weapons was unreasonable in its scope to involve exaggerated hair-splitting, we accept it as a correct extension of Terry v. Ohio, 392 U.S. 1 (1968), and Sibron v. New York, supra, 392 U.S. 40 (1968). Indeed, in light of Terry and Sibron, it is possible that if this case were before the California Court of Appeal de novo, this same result on the "frisk" question alone would be reached. See, People v. Britton, 264 A.C.A. 843, 70 Cal.Rptr. 586 (1968), hearing denied. But we cannot accept this Court's conclusion that the officers did not otherwise have probable cause to make an arrest.

In 1965 when the trial judge had this case before him, he concluded:

"But I think the officers had every right to arrest this man without even patting him down or anything else. He was out there operating with a couple of juvenile prostitutes, concealing himself, but it's true the officers spent a lot of time talking about nerve pills

in his possession.

"I think they had the right to make the search, make the arrest." (Reporter's Transcript, p. 5).

We argued, in the California Court of Appeal, the District Court and in this Court, that this conclusion by the trial judge was correct. But the District Court as well as the California Court of Appeal did not pass upon this issue since they found that the "frisk" search and the subsequent discovery of the seconal pills and marihuana was proper. But this Court, without any analysis or citation to any precedent, finds the trial court's conclusion unwarranted. The opinion summarily states:

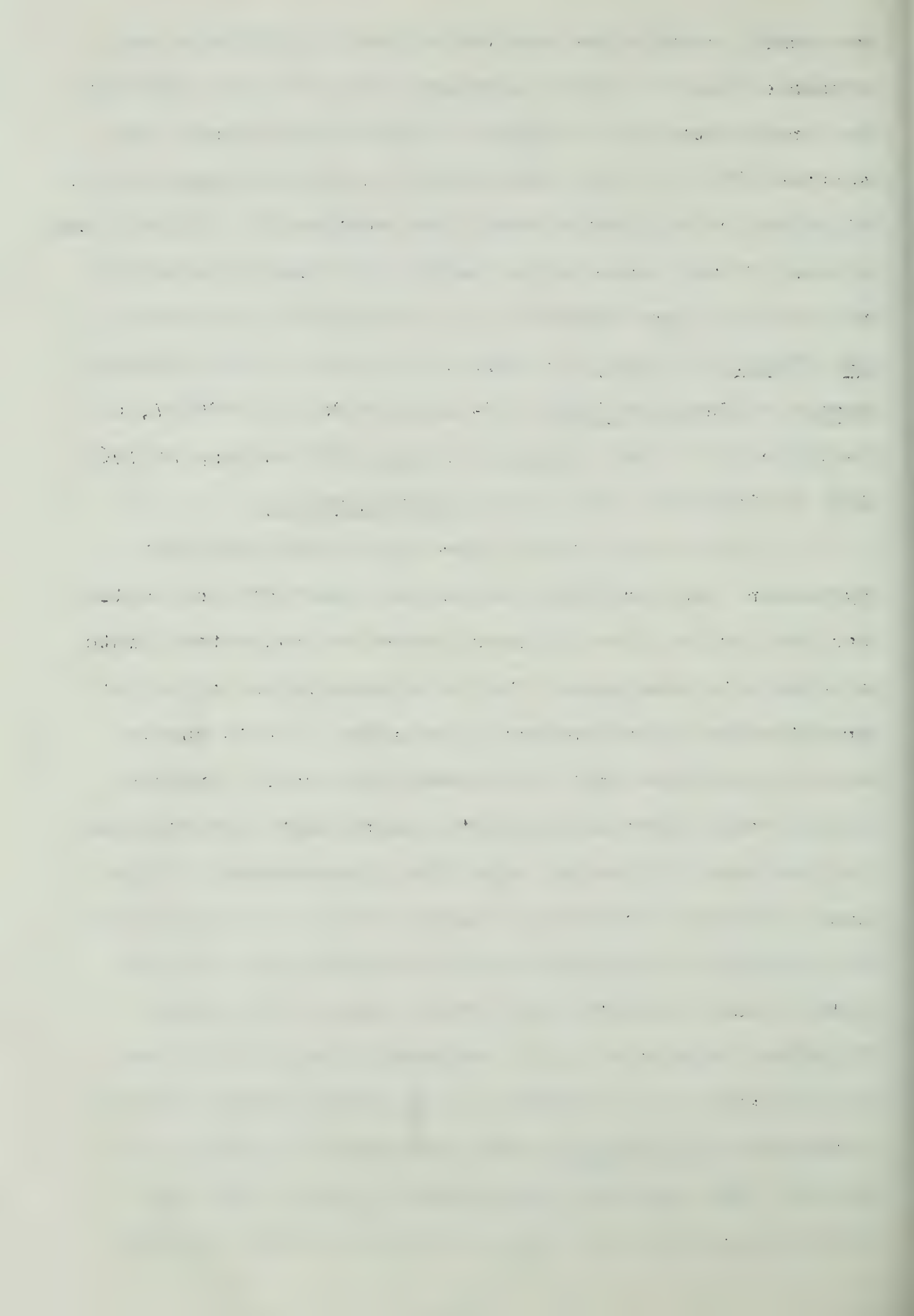
"We could not accept the proposition that Tinney's mere presence in the automobile and the resulting inference of his apparent association with the female offenders, standing alone, would supply sufficient probable cause for his arrest. Neither, apparently, could the reviewing California court, for its decision did not so hold." Slipsheet Opinion at p. 5.^{1/}

A realistic, reasonable approach to this case,

1. To conclude, merely because the California Court of Appeal did not pass upon this question, that that court thereby concluded there was an absence of probable cause appears to us to be a wholly unwarranted bit of speculation.

we submit, compels the conclusion that the officers had probable cause to arrest appellant for aiding and abetting the prostitutes in a violation of California Penal Code section 647(b) or for contributing to their delinquency in violation of California Penal Code section 272. This is not a case of "mere association" with or of "mere proximity" to others who are engaged in the commission of a crime. See, People v. Simon, 45 Cal.2d 645, 290 P.2d 531 (1955); Nugent v. Superior Court, 254 Cal.App.2d 420, 426-27, 62 Cal.Rptr. 217 (1967); People v. Ross, 223 Cal.App.2d 196, 198, 35 Cal.Rptr. 254 (1963), hearing denied.

Appellant was far more than a mere innocent bystander. He was hiding in the back seat of a car which was used by two juvenile prostitutes who had entered into an elaborate arrangement for the commission of an act of prostitution in another car in an alley. It is surely naive to conclude that his presence was wholly innocent. Indeed, this Court concluded that appellant's presence in the back seat of the car under the circumstances of this case justified the officer's belief that he was there for the purpose of committing robbery in the alley and that this in turn warranted the "frisk" search for weapons. Slipsheet Opinion at p. 6. We submit that if that fear on the part of the officer was justifiable under the circumstances, a fortiori it was reasonable for him to believe that appellant was acting in concert with the juvenile prostitutes -- i.e., aiding and abetting their



commission of a violation of subdivision (b) of California Penal Code section 647. Incidentally, that offense is committed if an act of prostitution is solicited as well as when actually completed.

The "workable" California rule developed in this type of case is that the "totality of circumstances" must be examined in order properly to assess the existence of probable cause to arrest. People v. Harris, 62 Cal.2d 681, 683, 43 Cal.Rptr. 833, 401 P.2d 225 (1965); People v. Dabney, 250 Cal.App.2d 933, 940-42, 59 Cal.Rptr. 243 (1967), hearing denied; People v. Green, 152 Cal.App.2d 886, 889, 313 P.2d 955 (1967); Montgomery v. Superior Court, 146 Cal. App.2d 622, 623, 304 P.2d 206 (1956); cf. Peters v. New York, reported sub. nom., Sibron v. New York, supra, 392 U.S. 40, 66 (1968). If that totality of circumstances would indicate to a reasonable man with the training and experience of a police officer working in his specialty field that a crime was being committed in his presence, then there is probable cause to make an arrest.

Thus, for example, in People v. Harris, supra, the presence of a suspect's wife in a car parked outside of premises into which her husband entered to purchase narcotics from a known seller was held sufficient to raise an honest and strong suspicion that the wife was her husband's accomplice. And, in People v. Dabney, supra, the defendant attempted to conceal himself from investigating officers (as was done in this case) and this fact was

considered persuasive to the court in reaching the conclusion that he was not a mere bystander but was implicated in a narcotics violation committed by another person.

These California cases, we submit, have established "workable rules" which are in complete harmony with the Fourth Amendment. Regardless of the legality of the "frisk" search viewed alone and by itself, we submit that the issue of probable cause under the "totality of circumstances" must also be addressed. It is respectfully submitted that the cavalier and perfunctory assessment of this question in this Court's opinion does not satisfactorily answer this issue. We earnestly submit that a rehearing be granted and that the Court carefully reconsider the issue of probable cause in light of all of the circumstances. We believe that the "totality" is clearly sufficient to establish probable cause to arrest appellant for complicity in the prostitution offenses. Apropos here is the observation of the Supreme Court in the Peters case: "It is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity." 392 U.S. at 66.

II

THE COURT'S ORDER TO THE DISTRICT COURT
ON REMAND IS WHOLLY INAPPROPRIATE.

Even if this Court should deny a rehearing and refuse to re-evaluate the issue of probable cause to arrest in light of the "totality of circumstances," we submit that the disposition ordered in this case is unrealistic.

Moreover, it is an unwarranted interference with orderly state criminal procedures.

The Court's opinion concludes with the following paragraph:

"Upon remand, the District Court will hold Tinney's petition in abeyance in order to afford California authorities a reasonable time, not exceeding thirty days, within which to conduct, if they choose to do so, a new trial in which the unconstitutionally obtained evidence is suppressed." Slipsheet Opinion at p. 8.

We are considerably puzzled by this disposition. The Court's accommodating grant of a thirty day delay before action is to be taken by the District Court, and its invitation to conduct a retrial of appellant, while gracious, is manifestly unrealistic. The charge in this case is possession of marijuana in violation of California Health and Safety Code section 11530. Yet, the Court's disposition of the case seemingly requires that the marihuana evidence which would be the basis for such a prosecution must be suppressed. Are we thus to presume that the prosecution is permanently disabled from establishing probable cause in this case?

It must be remembered that this case was tried by being submitted on the transcript of the preliminary examination. It is common knowledge that the evidence which is introduced at that point is usually sketchy. See People v.

Gibbs, 255 Cal.App.2d 739, 743-44, 63 Cal.Rptr. 471 (1967), hearing denied. But the effect of the Court's disposition is to forever preclude the prosecution from introducing additional evidence which, as it may turn out, might overwhelmingly establish probable cause to arrest.

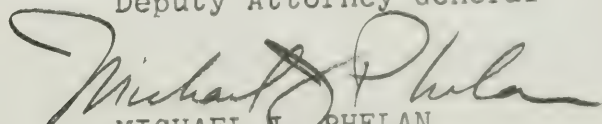
Moreover, the procedure ordered by the Court is technically impossible. At this point there has been no order vacating appellant's judgment of conviction. But the District Court has now been directed to wait thirty days to allow the state to retry appellant before entering an order vacating that judgment. Were we to follow the Court's suggestion and institute a new trial under a new indictment or information, it would appear that appellant would have a quite valid claim of former jeopardy. Further, California Penal Code section 654 would also bar the prosecution.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to grant a rehearing in banc, to reconsider the issue of probable cause to arrest in light of the totality of circumstances and upon reconsideration affirm the order of the District Court.

DATED: March 14, 1969

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NO. 22275 ✓

FEB 23 1969

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER E. CRAVEN, Warden,
Folsom State Prison, et al.,

Appellant,

vs.

BILLY NORMAN GRIMM,

Appellee.

APPELLEE'S BRIEF

FILED

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NO. 22275

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER E. CRAVEN, Warden,)
Folsom State Prison, et al.,)
Appellant,)
vs.)
BILLY NORMAN GRIMM,)
Appellee.)
_____)

APPELLEE'S BRIEF

STATEMENT OF ISSUES

WHETHER APPELLEE'S FEDERAL CONSTITUTIONAL RIGHT
TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WAS ABRIDGED.

STATEMENT OF THE CASE

A. Nature of Case

Appellant has appealed to this court from an
Order of the United States District Court for the Northern
District of California Granting Appellee's Petition for a
Writ of Habeas Corpus.

B. Course of Proceedings and Disposition in the State Courts and Federal District Court.

Appellant fully and fairly recounts the proceedings and disposition of this case in the courts below in his opening brief (Appellant's Opening Brief 1-3).

C. Statement of Relevant Facts.

The facts concerning the issues raised before this Court are fully and fairly stated in the August 4, 1967 Order of the District Court (RT 158-62). Relevant findings are reproduced here for ease of reference.

"The facts are found to be as follows: Officer Le Sur and Officer Cornett of the Culver City Police Department were on patrol in their marked patrol car around 3:30 a.m. on January 16, 1962. As they drove eastward on Washington Boulevard in Culver City, they noticed a 1961 Chrysler station wagon on Sentney Street, which was either stopped or just beginning to pull onto Washington Boulevard ahead of the police car. The station wagon then proceeded eastward on Washington. At the same time the police officers observed the automobile pulling out onto Washington, they observed a man walking away from the car in a westerly direction on Washington. The officers then made a U-turn and approached the man seen walking away from the vicinity of the Chrysler station wagon, but as they approached, the man ran around a building and disappeared.

The officers then searched the area for the man, but without results, for around five minutes until they saw what appeared to be the same 1961 Chrysler station wagon heading west on Washington Boulevard. Their suspicions aroused, the officers followed the automobile and stopped it shortly thereafter.

"Up to this point, the facts are undisputed and in the sole knowledge of the police officers. What transpired subsequently is the subject of controversy. However, the Court is of the view that the variances in testimony are not dispositive for the most part and will accept the testimony of the police officers except where petitioner succeeded in convincing the Court otherwise at the evidentiary hearing.

"Officer Le Sur testified at trial that after stopping the car, petitioner stepped out on the driver's side of the station wagon and started walking back toward the police car, that Officer Cornett approached petitioner and asked for identification; that Officer Le Sur walked up to the right side of the station wagon, shined his flashlight into the car and observed a brown cloth bag lying on the front seat and a pry-bar and flashlight lying on the front floorboard on the passenger's side. Officer Le Sur then testified that he asked petitioner if he could have a look in his car, and petitioner said, 'Yes,

of the station wagon, Officer Le Sur testified that he looked under the front seat and saw two pairs of brown leather gloves under the front seat on the driver's side. He then tried the glove compartment, but found it locked and asked petitioner if he had a key, to which he replied, he did not have a key. He then looked in an open ash tray, found a key and used it to open the locked glove compartment. The glove compartment yielded two hand guns in holsters. At this point, without any knowledge that an armed robbery had actually occurred, he placed petitioner under arrest for armed robbery, placed him in the back seat of the patrol car and conducted a thorough search of the station wagon, which turned up four quarts of Canadian Club whiskey and a green bag containing money. These latter articles were found under the spare tire in the tire well just forward of the rear gate of the vehicle.

"Petitioner was then taken to the station and booked, after which a search of the green bag yielded a roll of coins with the name 'J-Nick's' printed on the side. A police unit was then dispatched to J-Nick's bar in Culver City, and later the arresting officers went to J-Nick's bar, where it was determined that someone had broken through the ceiling of the bar and removed money from

"At petitioner's trial, commencing March 12, 1962, the evidence seized from the Chrysler station wagon was introduced in evidence against him, and the jury ultimately returned a verdict of guilty of first degree burglary, Cal. Pen. Code § 459. No other incriminatory evidence was introduced at trial with the exception of some photographs of the scene of the alleged burglary and a statement made by petitioner to the police officers, which was basically consistent with his testimony at trial." (RT 158-161). (Footnote omitted).

SUMMARY OF APPELLEE'S ARGUMENT

The District Court, in finding that Appellee (hereinafter referred to as "Petitioner" for clarity) was convicted by a state court solely on the basis of evidence procured during the course of an illegal search and seizure, did not err. Rather, the facts of the instant case abundantly show that Petitioner was subjected to an illegal search and seizure in blatant violation of the rights afforded every citizen by the Fourth Amendment to the Constitution of the United States of America and made applicable to the States by the Fourteenth Amendment thereto.

ARGUMENT

THE SEARCH AND SEIZURE VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

A. Introductory Statement.

Petitioner contends, and the District Court in its Order Granting Petition For A Writ of Habeas Corpus dated August 4, 1967, found, that he was convicted on the basis of evidence obtained by an illegal search and seizure. (R2 157, 166-67).

Appellant challenges the findings of the District Court and attempts to justify the illegal search and seizure by arguing that: (1) Petitioner consented to the search; (2) the search of a locked glove compartment was a proper precautionary measure for the protection of the police officers; and/or (3) the police officers had probable cause for Petitioner's arrest and, therefore, the search was legal as being incidental to that arrest. These arguments have heretofore been rejected by the District Court. Petitioner contends that proper analysis of the facts, together with proper application of the law, commands such rejection by this Court.

Appellant fails to distinguish clearly the events which took place on the morning of January 16, 1962, when Petitioner was stopped and his automobile searched by the police officers. Proper analysis shows that the events occurred in four distinct stages: (1) The stopping of Petitioner's vehicle; (2) The initial, exploratory search of Petitioner's vehicle; (3) The arrest made on the basis of the fruits of the initial

search; and (4) The second search made after the arrest.

B. Constitutional Protection.

The right of every citizen to be secure in his person, house, papers and effects, against unreasonable searches and seizures is guaranteed by the fundamental law of the land. The Fourth and Fourteenth Amendments of the United States Constitution and the exclusionary rules set forth in Weeks v. United States, 232 U.S. 383 (1914) are applicable to officers and courts in every jurisdiction in the United States, state and federal alike. Mapp v. Ohio, 367 U.S. 643 (1961).

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. The security of one's privacy against arbitrary intrusion by the police is at the core of the Fourth Amendment and basic to a free society. Schmerker v. California, 384 U.S. 757 (1966).

As the Supreme Court noted in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), "We have recently held that 'the Fourth Amendment protects people, not places,' Katz v. United States, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 582, 88 S. Ct. 507 (1967), and wherever an individual may harbor a reasonable 'expectation of privacy,' *id.*, at 361, 19 L. Ed. 2d at 588 (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion." The test of reasonableness under the Fourth Amendment is equally applicable to searches of automobiles and must be met before evidence obtained as a result of such searches is admissible. Preston v. United States, 376 U.S. 364, 367 (1964).

The protections afforded by the Fourth Amendment are implemented by the general rule that no search is lawful without a search warrant unless the search falls within an exception to that general requirement. Rios v. United States, 364 U.S. 253, 261 (1960); Jones v. United States, 357 U.S. 493, 499 (1958); United States v. Jeffers, 342 U.S. 48, 51 (1951). The facts of the instant case clearly show that the exploratory search conducted by the Culver City police cannot survive the constitutional requirement that only upon a showing that the surrounding facts brought the search within one of the exceptions to the rule that a search must rest upon a search warrant may it be lawfully conducted without such a warrant. Rios v. United States, 364 U.S. 253, 261 (1960).

C. The Arrest.

Petitioner wishes at this time to focus upon the events leading up to the arrest. There can be no question that the arrest took place no later than that point in time when Petitioner was placed in handcuffs and informed he was under formal arrest. At this point in time, Officer Le Sur testified, and the District Court so found, that Petitioner was outside of his car. (RT 159). In addition, it should be noted that Officer Le Sur testified that his fellow officer had prior thereto frisked Petitioner for weapons. (TT-35*). Officer Le Sur testified that he placed Petitioner under arrest for armed robbery after discovering two holstered hand guns in the locked glove compartment of Petitioner's vehicle. As to whether the "arrest" took place prior to this time, note should be made of the federal rule laid down in Henry v. United States, 361 U.S. 98, 103 (1959).

Whenever the arrest took place, it is quite clear that prior to the exploratory search during which the two hand guns were found, there clearly was no probable cause for arrest and the District Court has so found. (RT 166).

The Supreme Court, in Kerr v. California, 374 U.S. 23 (1963) has made clear that states are free to apply different standards of arrest from those formulated by the Supreme Court in the exercise of its supervisory authority over the administration of criminal justice in the federal courts. It must, however, be remembered that overriding whatever rules a state may follow the protection of the Fourth Amendment is supreme. "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station-house and prosecution for crime - 'arrests' in traditional terminology." Terry v. Ohio, 391 U.S. 1, 16; 20 L. Ed. 2d 839, 903 (1968).

The California standards for arrest of a person in an automobile have been set forth in People v. Mickelson, 59 Cal. 2d 448 (1963), a case which in many ways is analogous to this one. In that case, the California Supreme Court noted:

"[W]e have consistently held that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the streets for questioning. If the circumstances warrant it, he may in self-protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons. Should the investigation

then reveal probable cause to make an arrest the officer may arrest the suspect and conduct a reasonable incidental search." (People v. Mickelson, supra, at 450-51)

In the Mickelson case, although the police officer had investigated a recent robbery in the neighborhood; although the robber had been described to the police officer and was known to be armed with a gun, although a man fitting the description was observed by the officer driving an automobile about six blocks from the place of the robbery, although the automobile proceeded in an erratic manner so that it was obvious the driver was either trying to evade the police officer or was confused and did not know the area very well, although it was about 2 A.M. in the morning, and although the officer observed the passenger in the automobile bend forward in the seat and down and then raise back up, the California Supreme Court nevertheless held that an exploratory search by the officer after stopping the automobile exceeded the bounds of reasonable investigation. The court reasoned thusly:

"It was not unreasonable for the officer to stop Zauzig's car for investigation and to take reasonable precautions for his own safety. He did not have probable cause, however, to arrest Zauzig for robbery. There could have been more than one tall white man with dark hair wearing a red sweater abroad at night in such a metropolitan area. Although Zauzig was in the vicinity of the robbery, he was not observed until about

20 minutes after it occurred when he was driving toward the scene of the crime, not away from it. The officer had no information that the robber had an automobile or a confederate. The erratic route of the car and defendant's movement in the seat were at most suspicious circumstances. The officer's investigation elicited identification upon request and a story consistent with the movements of the car and the officer's own assessment of those movements. Both occupants were out of the car away from any weapons that might have been concealed therein. Instead of interrogating Zauzig and defendant with respect to the robbery or requesting them to accompany the officers the few blocks to the market for possible identification, the officer elected to rummage through closed baggage found in the car in the hope of turning up evidence that might connect Zauzig with the robbery. That search exceeded the bounds of reasonable investigation. It was not justified by probable cause to make an arrest, and it cannot be justified by what it turned up." (People v. Mickelson, supra, at 454.) (Emphasis added).

Whether or not the rule of reasonable detention set forth in the Mickelson case could withstand a challenge on constitutional grounds, Petitioner contends that the behavior of the police officers in the instant case exceeded even the liberal California rule.

In the August 4, 1965 Order of the District Court in this case, the Court noted:

"In the instant case, the officers stopped petitioner's car solely on the basis of some sort of suspicion based upon unusual activities occurring very early in the morning. Although they at that time had no knowledge that a robbery might have been committed or reason to suspect that a robbery had been committed, they were justified under the Mickelson test in stopping petitioner's car. There is nothing in the record, however, to indicate that probable cause to arrest petitioner for a burglary existed prior to the discovery of the gun, and no formal arrest was made prior to that point. The mere fact that a suspicious automobile was in the area might have let out a man who ran from the patrol car and the fact that the officer saw a brown cloth bag on the front seat and a pry bar and flashlight under the passenger side of the front seat gave no cause to arrest petitioner for burglary. When petitioner was asked for permission to search the car and he initially gave permission, the only additional items found were two pairs of brown leather gloves. Although these items taken as a whole could corroborate independent evidence that a burglary had been committed, standing alone with only the suspicious

did not constitute probable cause to arrest for burglary, even if a formal arrest was made at this point." (RT 165-66).

D. Precautionary Search.

Appellant next seeks to justify the exploratory search of the locked glove compartment of the car as a proper precautionary measure for the protection of the police. To pose such an argument borders on the absurd. At the time of the search of the locked glove compartment, Petitioner was not in the vehicle. He had earlier walked away from the vehicle, was under the watchful eye of Officer Le Sur's fellow officer and may already have been frisked. That Petitioner posed no immediate threat to the officers is clear. That the search of the locked glove compartment cannot be justified as a necessary precaution is equally clear. See Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), and Sibron v. New York, 392 U.S. 40, 20 L. Ed. 2d 917 (1968).

E. Consent to Search.

Finally, Appellant seeks to justify the warrantless search as being based upon Petitioner's consent. The law in this circuit and elsewhere is quite clear that consent to search will not be presumed. The prosecution must establish that the consent was voluntary and the standard for determining that voluntariness is the same as that applied to waiver of a constitutional right. Montana v. Tomich, 332 F. 2d 987 (9th Cir. 1964); Channel v. United States, 285 F. 2d 217 (9th Cir. 1960); Cipres v. United States, 343 F. 2d 95 (9th Cir. 1965); United States v. Stanack Sales Co., 387 F. 2d 849 (3rd Cir. 1968).

Again, quoting the District Court in this case:
"An analysis of the facts of the instant case shows
that there was limited consent at best

[C]onsent was needed for the officers to enter the
automobile when petitioner was outside the car and
away from it and posed no immediate threat to their
persons. The facts are in conflict with respect to
any consent to a search at all. Officer Le Sur
testified that he asked the defendant if he could
have a look in his car, and the defendant replied,
'Yes, go right ahead.' Petitioner testified that
the officers proceeded forthwith to search his car
after removing him from the car at gun point and
did not seek his approval in any way. Assuming
the officer's version of the facts is correct,
petitioner's statement does not establish suffi-
cient consent for the search that transpired.

First, petitioner merely consented to letting
the officers look in the car, not to a thorough
rummaging about. Assuming the consent he initially
may have given was sufficient to justify entering
the car and looking around, thereby turning up the
pairs of leather gloves, such facts did not in
and of themselves justify the subsequent search
of the glove compartment. The testimony is not
in conflict that when the officers asked for a key
to the glove compartment, the petitioner replied
that he did not have one. Any consent which may

have existed at that point was terminated, and the officers were not free to continue the search, even though they found a key to the glove compartment in an open ash tray." (RT 163-64)

In Cipres v. U.S., 343 F. 2d 95 (9th Cir. 1965), under circumstances which might be classed as suspicious, police officers informed Cipres that they suspected her luggage which she was checking with an airline contained marijuana. Cipres denied the charge and, when asked, responded that the officer could search the bags; however, she added that she had left the keys elsewhere. The officer examined the bags, found them unlocked, and proceeded to search them. This court, on appeal, viewed the question as "whether Cipres had waived her constitutional immunity from unreasonable search and seizure." Cipres v. U.S., supra, at 97. Noting that the test of waiver in this context, means the "intentional relinquishment of a known right or privilege", Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), this Court said:

"Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld. We recently sustained a district court finding that such waiver was lacking despite an express verbal

consent, and such cases are common. They rest not only upon the nature of waiver itself, but also upon a recognition that the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights of the citizen. The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did." (Cipres v. U.S., supra at 97, footnotes omitted).

This court has repeatedly reaffirmed this test. See Schoepflin v. United States, 391 F. 2d 390 (9th Cir. 1968); Oliver v. Bowens, 386 F. 2d 688 (9th Cir. 1967); Oliver v. Amiotte, 382 F. 2d 987 (9th Cir. 1967); Vanella v. United States, 371 F. 2d 50 (9th Cir. 1966);

In Schoepflin v. United States, 391 F. 2d 390, 398 (9th Cir. 1968), this Court, after setting forth the above principals, established that there cannot be an effective waiver unless under the described circumstances, the words used reflected (1) an understanding, (2) uncoerced, and (3) unequivocal election to grant the officers a license which (4) the person in question knew may be freely and effectively withheld.

That the so-called consent in this case fails to meet this test is apparent and the District Court so found.

The District Court noted that:

"Petitioner made it quite clear at the evidentiary hearing that he knew the guns were in the glove

compartment and had no desire whatsoever to have the officers search the glove compartment and find the guns. He further indicated that he had some previous knowledge of the law of search and seizure, having succeeded after a prior arrest in having the charges dismissed on the grounds of an illegal search and seizure. The Court concludes that in the light of petitioner's knowledge of the presence of the guns, his background with the law of search and seizure and his denial that he had a key to the locked glove compartment, he can in no way be said to have unequivocally waived his right to rely upon a warrant or at least the existence of probable cause to arrest at that precise time. The mere fact that the exploratory search turned up two hand guns in the glove compartment, which led to placing him under arrest for burglary, in no way justifies the exploratory search."


While Petitioner's prior knowledge may be argued to be an indication that he had an understanding of the law of search and seizure, the first item in the four point test set forth by this Court, this understanding coupled with the uncontradicted refusal to produce a key to the locked glove compartment completely negates any possibility that Petitioner made an unequivocal election to grant the officers a license to search. In addition, and notwithstanding Petitioner's prior knowledge, no evidence has been introduced to show he was informed of his constitutional right to freely and effectively withhold consent.

In short, Officer Le Sur did not have consent to search the glove compartment of the automobile and was able to look in it only after a prior search disclosed a key. Officer Le Sur did not have probable cause to arrest at that point in time. The California doctrine of reasonable detention had long since spent itself -- one could hardly claim that it was necessary for the officers' safety to search a locked glove compartment when the only occupant of the car was already outside of the car and had himself been frisked. Viewed in its best light, the non-consensual opening and searching of the glove compartment can be only described as a blatant exploratory search of the kind prohibited by the Fourth Amendment of the United States Constitution. The activities of the officers did not come within the limited exceptions of the constitutional mandate to search only with a warrant and, therefore, were illegal.

CONCLUSION

For the reasons discussed above and in the August 4, 1967 Order of the District Court in this case, Petitioner respectfully submits that the District Court did not err in granting the Petition for a Writ of Habeas Corpus. Accordingly, Petitioner respectfully requests that the Order of the United States District Court for the Northern District of California Granting Petition For a Writ Of Habeas Corpus be affirmed.

Dated: February 19, 1968


Thomas A. Lee, Jr.
Attorney for Appellee by Order
of the United States District

CERTIFICATE OF SERVICE BY MAIL

I, Mary Jean Lamberson, declare:

I am a citizen of the United States, over 18 years of age, and not a party to the within cause; my business address is 120 Montgomery Street, 11th Floor, San Francisco, California 94104; I served two (2) copies of the attached Appellee's Brief on the following, by placing same in an envelope addressed as follows:

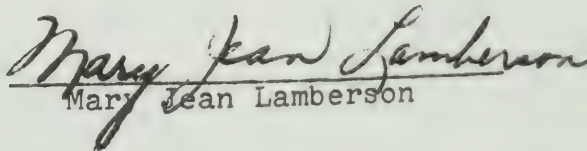
Attorney General of the State of California
6000 State Building
San Francisco, California 94102

Attention: Lawrence R. Mansir,
Deputy Attorney General

Said envelope was then, on February 19, 1969, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 19, 1969, at San Francisco, California.


Mary Jean Lamberson

NO. 22275

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER E. CRAVEN, Warden,
Folsom State Prison, et al.,

Appellant,

vs.

BILLY NORMAN GRIMM,

Appellee.

FEB 24 1969

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS
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Appellant,)
vs.)
BILLY NORMAN GRIMM,)
Appellee.)

APPELLANT'S OPENING BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellee's petition for writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

On March 14, 1962 appellee, Billy Norman Grimm, was convicted of first degree burglary in Los Angeles County, and subsequently sentenced to state prison for the term prescribed by law. He filed a timely notice of appeal. On July 27, 1962

Grimm withdrew his appeal, thereby revesting the sentencing court with jurisdiction. On the motion of both the prosecutor and the public defender, the judgment sentencing Grimm to state prison was vacated. Grimm was then sentenced to state prison for the term prescribed by law, but the execution of the sentence was suspended and Grimm was placed on ten years probation and required to serve one year in the county jail. After an escape by Grimm from the county jail, his probation was revoked, the suspension of the prison sentence was lifted, and he was committed to state prison for the term prescribed by law for first degree burglary. He did not appeal from the July 27, 1962 judgment which sentenced him to state prison.

Grimm subsequently filed petitions for writs of habeas corpus with both the Marin County Superior Court and the California Supreme Court. Both were denied.

More detailed statements about the proceedings in the state courts are found in appellant's "Supplemental Points and Authorities in Opposition to Petition for Writ of Habeas Corpus" (RT 63-64).

B. Proceedings in the federal courts.

On January 24, 1966 appellee filed a petition for writ of habeas corpus with the United States District Court. The proceedings in the federal court are fully and fairly stated in appellee's "Supplemental Points and Authorities Supporting Petition for Writ of Habeas Corpus" (RT 87-89). This statement recounts the proceedings up to the time that the District Court ordered an evidentiary hearing.

An evidentiary hearing was held on March 10, 1967. Appellee was the sole witness at the evidentiary hearing. Various documents were introduced into evidence. Counsel stipulated as to certain testimony that would have been given by witnesses not present (RT 115-16). At the close of the evidentiary hearing the District Court requested further Points and Authorities by both counsel on questions which had arisen during the course of the hearing. Counsel for appellee (RT 117) and counsel for appellant (RT 147) thereupon filed the requested Points and Authorities.

On August 4, 1967 the District Court entered its order granting the petition for writ of habeas corpus (RT 157-69). Appellant thereupon petitioned the District Court for a certificate of probable cause to appeal the order entered on August 4, 1967 by the District Court (RT 170-72). On August 24, 1967 the District Court granted the certificate of probable cause (RT 173). Upon motion of appellant (RT 174-75), the District Court stayed the execution of the August 4, 1967 order pending the proceedings on appeal before this Court (RT 176).

STATEMENT OF FACTS

The relevant facts concerning the issues raised before the District Court and now raised before this Court are fully and fairly stated in the August 4, 1967 order of the District Court (RT 158-62).

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SUMMARY OF APPELLANT'S ARGUMENT

The District Court, finding that the search of appellee's vehicle was illegal, erred in three respects: (1) appellee intelligently and voluntarily consented to the search of the vehicle, (2) the search of the glove compartment was a proper precautionary measure by the police even if they lacked probable cause for arrest at that stage, and (3) the police had probable cause for appellee's arrest and the search of his vehicle was incidental to that arrest.

ARGUMENT

THE SEARCH OF APPELLEE'S VEHICLE WAS REASONABLE.

When the United States Supreme Court extended to states the exclusionary rule for illegal searches and seizures, the rationale advanced was that the rule would deter lawless and unconscionable invasions of privacy by the police.^{1/} To apply the Mapp rule to this case, a case in which the police actions were virtually compelled by their duty to protect the community, is to lose sight of this rationale. The application of the exclusionary rule to circumstances like the instant

1. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court stated:

"[T]he purpose of the exclusionary rule 'is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.'" Id. at 656.

"Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold."
Id. at 657.

ones not only turns an obviously guilty criminal free but also lacks the saving grace noted in Mapp of discouraging the state from a "failure to observe its own laws, or worse, its disregard of the charter of its own existence." Id. at 659.

The Order of the District Court accurately and fairly recounts the facts surrounding the search and seizure in this case. The police saw appellee discharge a man from his station wagon at 3:30 a.m.; the discharged passenger began walking west on Washington Boulevard and the station wagon drove away east on Washington. When the police made a U-turn and approached the man on foot, he ran from them and disappeared around a building. The police searched but were unable to find him. Five minutes after the appellee's station wagon had discharged the fleeing man, the officers saw the vehicle re-enter the area - this time driving west on Washington Boulevard. They stopped the station wagon, and appellee got out and began walking back to the police vehicle. While one officer checked appellee's identification, the other shined a flashlight inside the station wagon and saw a brown cloth bag, a pry-bar, and a flashlight.

The officers then asked Grimm if they could search his vehicle and he replied, "Yes, go right ahead." Opening the door, one of the officers saw two pairs of gloves under the driver's seat. When he tried the glove compartment, he found it locked and asked Grimm for the key. Although Grimm replied he did not have a key, the officer saw one in the open ash tray on the dashboard, used it to open the glove compartment,

and discovered two loaded handguns inside. Grimm was then notified he was under arrest, and the officers embarked on a complete search of the vehicle and found the loot from the burglary for which Grimm was later convicted.

A. The consent to the search was voluntary and intelligent.

The Order of the District Court is uncertain on the issue of appellee's consent. It appears that the District Court found that appellee gave a "limited consent," which was terminated when he told them that he did not have a key to the glove compartment (RT 163-64). The reason for this "termination" is that the appellee was knowledgeable in the law of search and seizure and that he knew the guns were in the car. The reasons advanced by the District Court are not persuasive. Appellee's knowledge of the law of search and seizure, as well as his previous encounters with police, is evidence that petitioner could give an informed and voluntary consent.^{2/} Further, appellee's knowledge that the guns were in the glove compartment does not necessarily undermine this consent, for a criminal may make an intelligent and calculated consent to a search in the hope that the search will turn up nothing and

2. As the transcript of the Evidentiary Hearing discloses, appellee had just "beaten" a case on the basis of search and seizure law and this prior proceeding was fresh in his mind when he was stopped by the arresting officers (ERT 38-41).^{*} In this regard, the District Court noted that appellee was an intelligent man (ERT 75).

* "ERT" designates the transcript of the Evidentiary Hearing of March 10, 1967.

divert suspicion from him. In the instant case, the appellee was unaware of what the police knew about the burglary he had already committed and may well have attempted to divert police suspicion by agreeing to the search. That the police search was more intensive than he had hoped does not vitiate the voluntary nature of his consent. The Order of the District Court, in effect, would allow a suspect who knows he has contraband in his possession to consent to a search with absolute impunity. If the search turns up nothing, his stratagem in diverting suspicion succeeds. If the search turns up the contraband, then the courts will throw out the consent on the basis that the suspect knew the contraband was there.

It should be noted that there is nothing in the findings and conclusions of the District Court which even intimates that the police acted unreasonably in accepting appellee's consent. It seems bizarre that the exclusionary rule, the announced purpose of which is to deter lawless and unreasonable police action, is applied in this case in which the police acted reasonably in relying on the apparently free consent of the appellee. The District Court would exclude this evidence on the basis of supposed subjective knowledge on the part of appellee, knowledge which by its nature could not be known to the police.

We submit that appellee's consent under the circumstances was an effective one. In Schoepflin v. United States, 391 F.2d 390, 398 (9th Cir. 1968) this Court set forth this as a test for the effectiveness of a consent:

". . . [whether] the words used by Smith [the defendant] reflected (1) an understanding, (2) uncoerced, and (3) unequivocal election to grant the officers a license which (4) Smith knew may be freely and effectively withheld."

This Court remanded the case for a hearing on this question after observing:

"Nor did Smith himself say or do anything to indicate that he knew he had the right to withhold consent. While Smith had been convicted of prior robberies, there is no showing that they involved search and seizure questions which would have served to educate Smith as to his constitutional right to withhold consent." Id. at 399.

There can be no doubt that appellee was fully conversant with the law of search and seizure, and aware of his rights when the police stopped him. Further, the District Court found him to be an intelligent man. The District Court would throw out appellee's consent, not on the basis that he was unintelligent or ill informed, but because he had a secret reservation or hope that the search would not turn up the contraband. We submit that this is not the proper standard.

B. The search of the glove compartment was a reasonable precaution for the safety of the officers and persons in the area.

The Order of the District Court acknowledges that the arresting officers were justified in detaining appellee

because of the suspicious activities by him and his cohort (RT 165-66). As the United States Supreme Court held in Terry v. Ohio, 392 U.S. 1 (1968), 20 L Ed 2d 889, when the police stop a person for suspicious circumstances not amounting to probable cause for arrest, a precautionary search of that person may be justified. The test for the permissible limits of the search is:

" . . . whether it was reasonably related in scope to the circumstances which justified the inference in the first place." Id. at 905.

Elaborating on this test, the Court stated:

"[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he had probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 909.

In the case of a pedestrian on the streets, it may be sufficient, as it was in Terry, to "pat-search" the exterior clothing to discover guns, knives, clubs, or kindred weapons. Obviously, a different type of search is appropriate when the suspect is a motorist. In the latter case, reasonable prudence

dictates that the police also make a cursory search of the areas of the vehicle to which the driver has easy access, e.g., the front seat and the area below it, the glove compartment, and the area under the dashboard.

Applying the Terry test to the instant case, one must agree that reasonably prudent men in the position of the arresting officers would have concluded that a search of the glove compartment for weapons was essential for their own protection and that of others in the area. They had ample reason for suspecting that appellee was engaged in an early morning burglary, they saw burglar tools on his floor board, and they were aware of the strong possibility that appellee's confederate was still lurking in the area.

To the possible objection that the glove compartment was locked, the obvious answer is that glove compartments may be opened in a matter of seconds, especially when, as in the present case, the key to the compartment is readily available in the dashboard ash tray. Indeed, the ready availability of the key and the loaded handguns in the glove compartment suggest that appellee may have been prepared for a "shoot-out" with police when his arrest seemed imminent. Seeing the loaded guns in the glove compartment, the officers clearly had probable cause for appellee's arrest. Wilson v. Porter, 361 F.2d 412, 416 (9th Cir. 1966).

C. The police had probable cause for appellee's arrest before the glove compartment was searched.

Although the police had interrupted appellee and his

fleet-footed companion in the midst of what could well be an early morning burglary,^{3/} the Order holds that they could not legally search the appellee's vehicle for further burglar's tools, loot, or evidence which would lead to the identity or whereabouts of the fleeing man. This prohibition on police conduct flies in the face of common sense: the only alternative left to the police is to continue on their rounds and try to dismiss any concerns they might have about the safety of persons and property in the area.^{4/}

In reaching the conclusion that the facts described above did not give the officers probable cause to search appellee's vehicle, the District Court relied heavily on the California case of People v. Mickelson, 59 Cal.2d 448, 380 P.2d 658 (1963). As the discussion in the Order reveals, Mickelson was a case involving a known, completed robbery. Holding that the facts known to the officers did not amount to probable cause justifying a search of the vehicle, the California Supreme Court noted that the police could have taken the suspects to the crime scene a few blocks away for identification.

3. Surely this inference is reasonable in the light of the hour, the passenger's flight, appellee's return to the area, and appellee's having within easy reach three common instruments of the burglary trade: a cloth sack, a pry-bar, gloves, and a flashlight. Perhaps the word "interrupted" in this context is inaccurate, since for all the officers knew appellee's companion could have engaged in a burglary at the time they stopped appellee.

4. Unlike situations in which believed criminal activity is taking place at or emanating from a fixed locus, the circumstances obviously precluded obtaining a search warrant or arranging for a "stake-out" or close surveillance.

People v. Mickelson, supra, at 454. No such alternative was available to the police in the instant case.

Recent California and federal cases, which more closely approximate the facts of the instant case, would permit a search.

The facts in the recent case of People v. Ruiz, 265 A.C.A. 869 (1968), are similar to those of the instant case. In Ruiz, at 4:30 a.m. the arresting officers saw defendant and a companion apparently signalling with a flashlight. Another man approached the pair, but he reversed his direction and walked briskly away upon seeing one of the police officers. After driving in their patrol car, the officers spotted a parked car. When they pulled up behind it and turned on their spot light, they recognized the two men they had originally seen and could see a closed, large white bag in the rear of the parked vehicle. As in the instant case, the officers did not have any knowledge that a theft had been recently perpetrated. When the officers opened the door of the parked vehicle to question the occupants, they saw some change and currency in a white bag which may have been a money bag. The occupants were placed under arrest and a search of their car revealed further loot and burglar's tools. Upholding the legality of the search, the court stated:

"The courts desire to deter illicit police practices by prohibiting illegal searches but have not prescribed such rigid rules as to make all persons, no matter what their conduct, immune from police

investigation. Here . . . [the arresting officers] had urgent reasons for detaining appellant, and there were exception circumstances justifying the search. The officers believed the station wagon contained articles which had come into the possession of . . . [the suspects] illegally and which could be disposed of unless preventive measures were taken." People v. Ruiz, supra, at 875.

Another recent California case similar in facts to the instant one is People v. Davis, 260 A.C.A. 182 (1968). In Davis, the arresting officers saw the defendant walking at 3:00 a.m. through a closed service station parking lot in an area in which there had previously been numerous burglaries. When the officers stopped the defendant to question him, they made a cursory search for weapons and discovered he was carrying a pair of pliers and a screwdriver with a broken tip. In the words of the court: "tools normally utilized in such [juke box] burglaries." Id. at 185. On the basis of these facts, the court held:

"These facts were sufficient to give the officers reasonable cause to arrest defendant upon suspicion of the burglaries then under investigation. The further search of his pockets . . . was a proper incident of such an arrest." Id. at 185.

The federal courts have also consistently recognized that a police officer need not blind himself to suspicious activities which may indicate the persons or property are in

jeopardy. As this Court observed in Frye v. United States, 315 F.2d 491, 494 (9th Cir. 1963):

"[T]he local policeman, in addition to having a duty to enforce the criminal laws of his jurisdiction, is also in a very real sense a guardian of the public peace and he has a duty in the course of his work to be alert for suspicious circumstances, and, provided that he acts within constitutional limits, to investigate whenever such circumstances indicate to him that he should do so."

Based in part of this observation in Frye, this Court held in Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966), that:

"[D]ue regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their action."

As in Wilson, when the police perceive or learn other indications that the suspect is guilty of a crime, they may consider this further information in arriving at probable cause for the arrest and incidental search of the suspect.

We submit that the facts known to the officers gave them reasonable cause to believe appellee had either committed a felony or was engaged in the commission of one.

/

/


CONCLUSION

For the reasons discussed above, appellant respectfully submits that the District Court erred in granting the petition for writ of habeas corpus. As discussed above, the circumstances surrounding the search of appellee's vehicle render that search wholly reasonable and proper. Accordingly, we respectfully request that the order granting the petition for writ of habeas corpus be reversed.

DATED: November 21, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General

A handwritten signature in dark ink, reading "Lawrence R. Mansir". The signature is written in a cursive style with a large, stylized initial 'L'.

LAWRENCE R. MANSIR
Deputy Attorney General

Attorneys for Appellant

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002399

No. 21175 A-F

No. 22316 ✓

1 See Vol. 3472
APR 2 1969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of THE CALLAND CORPORATION, a corporation,

Debtor and Appellant,

vs.

UNITED INSURANCE COMPANY OF AMERICA, WILLIAM
N. BOWIE, JR.,

Appellees.

PETITION FOR REHEARING.

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Los Angeles, Calif. 90014,
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FILED

MAR 27 1969

WM. B. LUCK, CLERK

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No. 21175 A-F

No. 22316

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of THE CALLAND CORPORATION, a corporation,

Debtor and Appellant,

vs.

UNITED INSURANCE COMPANY OF AMERICA, WILLIAM
N. BOWIE, JR.,

Appellees.

PETITION FOR REHEARING.

*To the Honorable: Ben C. Duniway, Circuit Judge,
Walter Ely, Circuit Judge, Fred M. Taylor, Dis-
trict Judge:*

Appellant hereby respectfully petitions for a rehearing to reconsider the judgment entered in this action on March 13, 1969, on the following grounds and on the following points of law and fact overlooked or misapprehended.

I.

The Points of Law and Fact.

Preface.

It is appellant's position that each of the at least seven orders by the Referee, affirmed by the District Court's orders, considered separately, are erroneous and abuses of discretion but that the singular circumstances of this case requires that the said orders be further considered in context and the this case particularly (as all cases generally, in appellant's view) should be considered in its entirety.

The first order was preceded by substantial proceedings which separately and cumulatively resulted in the first order and the adverse consequences to appellant therefrom. The subsequent orders involved proceedings all of which, except two, were initiated either by United or the receiver and merely completed United's acquisition of appellant's property.

Appellant's proceedings before the Referee were serious, followed statutory and case law requirements, and were specifically based upon the record. Appellant's petitions for review similarly followed statutory and case law and were precisely made, seriously presented and seriously argued. Each of appellant's appeals was made within the statutory period and was a matter of right. They were similarly seriously and substantially presented with citations of applicable state and federal authorities and with explicit reference to the record. The record was complex and voluminous, since there were numerous and voluminous documents, numerous hearings, partial transcripts only since appellant has been without any funds. As this Court pointed out, there are some 61 general unsecured creditors (Op. 4). These were workmen and materialmen who constructed appellant's apartments and were unpaid. It was on their behalf that appellant took all its proceedings. Neither

appellant nor its attorney had any other “axe” to grind. Appellant had no funds. Its attorney was not paid any fees or costs except for some very small part of the latter. He alone was familiar with the record and he alone did all the work. This had to be fitted into his calendar despite the fact that his regular clients and regular calendar were subordinated to this case on many occasions. Appellant’s attorney is not a tyro. This is not his first federal or state appeal. The extensive record regarding the seven orders were epitomized but were sufficiently substantial and correct as to present the full record. This was a considerable task. There was *patently* substantial research and preparation, and in the opinion of appellant and its attorney the issues raised and the contentions made are substantial and supported by authority. This Court’s opinion affirming the orders was, of course, disappointing to appellant and to its represented creditors but was a foreseeable result. However, this Court’s consideration and decision of the issues and points raised by appellant were such that it appears to appellant that it failed to present the proper perspective and interrelationship and total consequences of the seven orders. Appellant and its attorney feel that the history of this case and appellant’s and its attorney’s efforts for the benefit of all the 61 general creditors, and the seriousness of the issues they raised, supported by the authorities cited, do not justify this Court’s expressed reflection upon them, and appellant’s counsel would be remiss in his professional duty not to state that opinion and to further state that it is unfair to counsel (who has dedicated 38 years to the practice and whose practice has been marked by the seriousness and quality of his ability and efforts in all judicial levels, trial and appellate, and noted by the records therein) to receive for his efforts in this case, not compensation from his client, not at least an acknowledgment of the objective of his services but a categorizing thereof as an “inexcusable performance”. The only “basis” for this is that appellant has taken the proceedings accorded it by statute and case law and opposed United and questioned the correctness of the Referee’s and the District Court’s orders. Lese majesty

is not part of our law. This Court's said view of this case indicates that appellant has not adequately presented to it the serious matters, some of first impression, which appellant has presented and which will be partially restated *infra*. Since each appeal was taken within the proper time, this Court could only refer to appellant's applications for extension of time. Each application was made and submitted to this Court. Each application was granted in the Court's exercise of its discretion. Appellant's motion to consolidate the appeals was granted. United's motion to dismiss the first two then pending appeals, was denied. The Court granted appellant leave to proceed on the original record and by typewritten briefs. Since appellant could not furnish the \$75,000 appeal bond fixed by the District Court for it did not have even 75¢, no detriment resulted to United. Further, United took numerous subsequent proceedings with favorable orders by the Referee and the District Court, and these further permitted it to accomplish its objective, and accordingly no detriment resulted to it. This Court in granting the extensions obviously considered the burden on appellant and its attorney, and its orders granting extensions were salutary and consistent with the basic concept of a "full day in court". Accordingly, neither the applications nor the orders for extension were improper. This Court's opinion creates a strange anomaly in that in criticizing appellant it criticizes itself or more properly the orders of a different judge. In this case most, if not all, orders were granted by Chief Judge Chambers. The applications granted by this Court were not and cannot be considered improper. Appellant's pursuit of its available remedies was not and could not be an abuse of judicial process. It is respectfully submitted that to in effect state that sanctions should be imposed but that they will not be because of this Court's "improvidence" is equivalent with charging and condemning without the opportunity to determine factually and legally whether the conduct warrants the same. This is so because the opinion does not state appellant's position as presented by it. This, unfortunately, is due to the complexity of the matter.

II.

This Court's Opinion.

The opinion indicates some of appellant's points of fact and law which were overlooked or misapprehended.

This Court states (Op. 1) appellant was unable to keep up payments to United.

This overlooks the fact that the original arrearages were caused by the malfeasance of appellant's officers, and thereafter a *new agreement* was made by its new officers and United, which they performed, paying in *excess of \$62,000*, in reliance thereon. (O.B. 8). The subsequent defaults were by Cohen, who was accepted and recognized as the owner by United despite appellant's rescission of its contract to see to Cohen and over its objections.

Appellant raised the point, which this Court does not consider in its opinion, that appellant could not be held responsible for Cohen's defaults in his said new agreement with United.

This Court refers (2) to appellant's claim of "fraud . . . and various other heinous practices on the part of appellees and others". Other than its statement of United's concealment of the status of Dunnigan when it had him appointed state receiver contrary to California CCP 566 (which is a species of fraud) and its breach of its agreement with appellant (which is a species of fraud only if it entered the agreement with the intention of performing it), and its obstruction of appellant's efforts to obtain refinancing or sale (which, technically, is not fraud), appellant's statements of United's acts are not covered by the Court's said statement. Crim's incompetency is; the receiver's bias and mismanagement are; his and United's bad faith are; United's estoppel is; "heinous" applies only to Cohen.

This Court states (2) that the record is contrary to appellant's claim that it was not given sufficient opportunity to show it was not in default. Appellant respectfully submits the record shows there *never was any hearing* on the merits. This was what appellant was entitled to and not the academic opportunity to do so.

It is appellant's position also that it was not even given that opportunity.

This Court states (2) that as to appellant's claim that United was estopped to foreclose because it had promised not to do so if appellant performed, the "short answer" was that appellant did not perform. This is incorrect. The record shows that it performed at least to the extent of \$62,000 as to United (O.B. 8) and additionally as to others (O.B. 9). There is misapprehension here in that Cohen's default with resulting increase in the balance due, which was permitted and, in fact, aided by United, is attributed to appellant, which was excluded by United.

This Court states (2) that appellant claims that there was a *novation* consisting of appellant asking United to cooperate with Cohen by giving him additional time to make the payments, and United agreed to do so. This is a serious misapprehension. That is *not* what appellant contends was a novation. What appellant contends was a novation was the *separate written* agreement between Cohen and United with which appellant had nothing to do and, in fact, had no knowledge of its contents, United refusing to disclose the same; further, United's treatment of Cohen as the owner and its refusal to recognize appellant's rights. This Court's statement that its claim of novation is "frivolous", is unfortunate particularly in view of its citation of *Fountainbleau Hotel Corp. v. Grossman*, 5 Cir. 1963, 323 F. 2d 937. *Fountainbleau* involved a plaintiff-tenant who had obtained a lease from the hotel for the exclusive right to sell women's apparel and his agreement with defendant-tenant for the latter to have a certain right to sell certain items within plaintiff's area. The agreement was *not* between the lessee and the hotel but between the lessee and his sublessee. In this case, of course, the agreement was between United, as the trust deed holder, and Cohen, whom it recognized as the owner, intentionally excluding appellant, and United changed the terms of Cohen's payments under the trust deed. *The primary right was the same, i.e., the trust deed, but United accepted another obligor, i.e., Cohen, and excluded appellant.* *Fountainbleau* involved Florida law. Appellant cited California law which sup-

ported its contention (O.B. 84-85). However, the following language in *Fountainbleau* supports appellant: (in defining "novation" it said, ". . . a substitution of a new contract between the same parties with the intention of extinguishing the old contract; the original obligor is freed from his obligation, but his contractual right must be intentionally relinquished, waived or replaced by another right or by another obligor under the same right" (i.e. Cohen).)

This Court states (2) that appellant claims United was in bad faith in giving Cohen time but not appellant. "frivolous". First, this was just *one* factor in the chain of elements regarding United's conduct. This *was* a fact but it was illustrative of the separate agreement and novation between United and Cohen. It should be noted the Court in *Fountainbleau* did not consider that appeal frivolous.

This Court states (2) that appellant complains that repair bills were increased and "now complains" the receiver paid no taxes and made no improvements. There is nothing inconsistent in these statements. Again, there is obvious misapprehension here. Appellant stated that the operating expenses increased while the rentals and income decreased, i.e., that it cost more to operate 50 apartments than 98. 21 apartments were damaged by Cohen but were not repaired to make them rentable. Appellant complained of this. Also, the nonpayment of taxes. Appellant cited authorities that both were required and the receiver was duty bound to do so. Yet this Court merely mentioned the item without deciding appellant's point. This Court states (2) that the relevance of the claim escapes it. Its relevance has been noted. If it is the duty of the receiver to maintain the property and he does not do so, as a result of which it deteriorates and appellant suffers, it is not only relevant but crucial. This Court then states (2) that the receiver could believe that appellant had no equity in the property. The receiver had knowledge of the various appraisals from 1,500,000 and the 1,125,000 appraisal United obtained on which it made its 700,000 loan *before construction*, as well as the Parr escrow for \$900,000, which, admittedly, was sufficient to pay all

obligations. The serious point is that appellant was so close to solution of its problems if the Parr escrow had been handled properly.

This Court states (2-3) that the only evidence appellant introduced regarding United's obstacle to re-financing was a declaration which was multiple hearsay. Again, this is obvious misapprehension. As appellant pointed out, it was *not* hearsay since declarant was stating *his* personal firsthand experience. He approached financial sources who had been either told by United or were repeated United's statements. Declarant was stating the fact that he could not obtain financing from his sources for that reason. This is not hearsay. The further point is that this should have been considered by the Referee with all the usual facts in full hearings.

This Court states (3) that appellant's contentions regarding United obtaining Dunnigan's appointment as state receiver were "completely outside the record". This, again, is the result of misapprehension. It was not outside the record. It was within appellant's documents before the Referee. This Court states that its relevancy also escapes it. It is submitted that for reasons noted in the briefs, in a discussion of Dunnigan, it was not only relevant but crucial and a critical issue, among other things, of estoppel.

Referring to Menick and his testimony, this Court states (3) the Referee was not required to accept the valuation of appellant's appraiser. This is generally true, subject to the limitation that a court cannot arbitrarily reject competent evidence. However, the real point is whether Menick's testimony was competent. Appellant presented substantial authorities to the contrary.

The Court then discusses (3) the questionable "heart" of the first appeal. This Court concludes its discussion with the statement that "Appellant thus had more than nine months to come up with a plan or a buyer". Again, there is misapprehension here. Some time was consumed in various proceedings attempting to ascertain the status of the receiver's operation. As the Referee himself conceded (O.B. 34), the pending proceedings and circumstances had "a tendency to hurt the

property which people think they can come in and take advantage". The difficulties in obtaining refinancing and sale because of United's obstruction were noted in the briefs. The damages to appellant's property and the decrease in the occupancy from 98 to 50 was also noted; from 98 to 71 during Dunnigan's receivership and from 71 to 50 during the Chapter XI proceedings! These were not normal conditions and they prevented normal transactions. This is what appellant stressed, *i.e.*, that the Court under Chapter XI exercised equitable powers for the purpose of doing justice to all interested parties. This Court cited *Mundt v. Home Federal Savings and Loan Association*, 9 Cir., 1965, 349 F. 2d 938. *Mundt* is factually and legally distinguishable (C.B. 33-34). Appellants' contention in *Mundt* was that they were denied the constitutional right to appointment of counsel to represent them in the bankruptcy proceedings. The only, tenuous, relevancy of *Mundt* is this Court's determination that there was no abuse of discretion shown. This Court did not consider that appeal frivolous. This Court refers (3) to the fact that the District Court, in affirming the first order, stayed proceedings subject to appellant's filing a bond. It does not state that the bond was for \$75,000 and that all appellant's assets were in the possession of the receivers and it had nothing with which to do so. It does not state that appellees strenuously argued that because appellant could not do so its appeal should be dismissed, an interesting and serious point. This Court states (3) that its consideration of the first appeal disposed of the second, third, fourth and seventh appeals.

This, again, is misapprehension. The second appeal was from an order authorizing the receiver to reduce the rents. Nothing involved in the first appeal relating to the first order, which was distinct in time and subject, related to the order involved in the second appeal (except in the sense all orders had a common eventual result), and, accordingly, this Court's treatment of the first appeal could not dispose of the second. The third appeal was from an order directing the receiver to relinquish possession to United, a fact which had already been accomplished about a month previously; the real purpose of that proceeding, however, was to obtain the Referee's finding that the sale to United, the previous

month, was valid and that it acquired title. *These were not issues at all and were beyond his jurisdiction.* Appellant substantially discussed this question. This Court has not considered it. The fourth appeal involved appellant's motion to remove the receiver. Appellant extensively covered this (O.B. 97-105). It submits that this is a most serious and important issue and is worthy of full consideration and statement by this Court. The seventh appeal involved the Referee's order denying appellant's motion for an order directing the trustee to defend United's state court action to quiet title to its property under circumstances which no one can deny constituted a predetermination (O.B. 67-75).

This Court refers (3) to the fifth appeal and states the Referee was correct in his ordering the insurance draft paid to United because the trust deed had a pertinent provision in that regard. Again, this is misapprehension. Appellant's position is that United had purchased the property "as is" under its deed of trust which merged into its "title" and, accordingly, it no longer gave United any such rights (O.B. 60-63; 80; 195).

This Court states (4) the sixth appeal was "also frivolous"; that appellant had not obtained consent from its creditors and had not made any deposits, and there was no error, citing *In re Webcor, Inc.*, 7 Cir., 1968, 392 F. 2d 892. This is clearly misapprehension. Appellant's position was that when a debtor in its situation cannot make any deposits since all of its assets are in the receiver's possession, there can never be a plan submitted by anyone in the same or similar position and that this is not the proper consideration and application of Chapter XI (O.B. 63-67; 83; 106). *Webcor* is factually and legally distinguishable. The failure to file a plan therein was held to be attributable to dilatory tactics (pt. 2). The Court cited *S.E.C. v. American Trailer Rentals*, 379 U.S. 594, 618, to the effect

"... Chapter X and XI were not designed to prolong—without good reason and at the expense of the investing public—the corporate life of every debtor suffering from terminal financial ills" (pt. 1).

Obviously there were good reasons in this case, there was no investing public involved. The Court in *Webcor* did not consider the appeal frivolous, and appellant's financial ills were not "terminal".

This Court overlooks the fact that despite the appraisals of 1,500,000 to Menick's \$850,000 United purchased the property for \$700,000; that there were no other bidders because of United's acts noted in the briefs. It is submitted that this clearly shows the injustice and inequity involved and that United and not appellant has abused the processes of the Court. It is submitted that considering even Menick's *unqualified opinion* of \$850,000 value and the Referee's finding of \$875,000 value, United's purchase of the property for \$700,000 under those circumstances, for \$170,000 less than the Referee found it to be worth under the adverse conditions involved, is eloquent confirmation of appellant's position.

This Court's last paragraph (4) has been discussed *supra*.

Conclusion.

It is a permissible conclusion by appellant that its presentation of the seven appeals, in the form and content of its briefs, carefully prepared and seriously presented, did not properly present the appeal to this Court and as a result of which the Court has overlooked those and other points of facts of law and has misapprehended them. The correct presentation of appellant's position is determinable from its Specification of Errors, in its opening brief, and in its argument therein. It was confirmed by appellant's reply to appellee's brief.

Unless equity has no place in bankruptcy and particularly Chapter XI, and unless justice is merely an abstract word, then reasons for applying both adequately exist in the record, and appellant again urges their application on behalf of the 61 unpaid workmen and materialmen appellant represents.

Dated: March 26, 1969.

Respectfully submitted,

A. V. FALCONE,

Attorney for Appellant and Petitioner.

Undersigned counsel certifies that this petition is not interposed for delay and that, in his judgment, it is well founded.

Dated: March 26, 1969.

/s/ A. V. Falcone

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No. 22,395

See Vol. 3476
APR 7 1969

**United States Court of Appeals
For the Ninth Circuit**

SHAFFER C. TIM,

Appellant,

VS.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,

Appellee.

**APPELLANT'S PETITION FOR REHEARING
and
PETITION FOR HEARING EN BANC**

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FILED

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No. 22,395

**United States Court of Appeals
For the Ninth Circuit**

SHAFFER C. TIM,

Appellant,

VS.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,

Appellee.

**APPELLANT'S PETITION FOR REHEARING
and
PETITION FOR HEARING EN BANC**

To the Honorable Frederick G. Hamley, Oliver D. Hamlin, and M. Oliver Koelsch, Circuit Judges, United States Court of Appeals for the Ninth Court:

**SUGGESTION FOR REHEARING EN BANC
PURSUANT TO F. R. C. P. 35(a)(2)**

Appellant respectfully suggests this Court rehear en banc the issue presented by this appeal for the reason that the proceeding involves a question of exceptional importance.

I.

INTRODUCTION

On March 18, 1969, the United States Court of Appeals for the Ninth Circuit, Circuit Judges Hamley, Hamlin and Koelsch presiding, rendered its opinion holding: the negligence of the stevedore, while acting within the course and scope of his employment on board defendant American President Lines vessel, afloat in navigable waters, which proximately caused injury to Appellant seaman, while acting within the course and scope of his employment as defendant's chief electrician on board said vessel, did not constitute negligence on the part of defendant, American President Lines, nor did such negligence constitute an unseaworthy condition.

The significance of this Petition for Rehearing En Banc is that the Ninth Circuit is the only Court in this land which has so interpreted *Mascuilli v. United States*, 387 U.S. 237, 358 F. 2d 133. The conclusion by this Ninth Circuit Court of Appeals is

directly contrary to opinions rendered by the United States Supreme Court, Second Circuit Court of Appeals, the Fourth Circuit Court of Appeals, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the Canal Zone, the United States District Court for the Western District of Louisiana, the United States District Court for the Eastern District of Louisiana and the Supreme Court of the State of New York.

II.

OPERATIONAL NEGLIGENCE OR INSTANTANEOUS UNSEAWORTHINESS ARE NO LONGER RELEVANT ISSUES WITH REGARD TO THE DOCTRINE OF SEAWORTHINESS

The United States Supreme Court in *Masculilli v. United States*, 387 U.S. 237, 1967 AMC 1702, 358 F. 2d 133, succinctly held that concepts of operational negligence and/or instantaneous unseaworthiness are no longer relevant issues in determining question of liability under the Doctrine of Seaworthiness.

The United States Supreme Court reiterated this conclusion by denying certiorari in the case of *Moore-McCormack Lines v. Candiono*, 390 U.S. 1027, 88 S. Ct. 1416.

The United States Supreme Court further reiterated its holding in *Masculilli v. United States* by denying certiorari in the case of *Skibinski v. Waterman*, 387 U.S. 921; 87 S. Ct. 2027.

The interpretation given by this Ninth Circuit Court of Appeals to the decision in *Masculilli v. United States*, *supra*, is directly contrary to the in-

interpretation given to that same decision by every Court which has passed upon or considered that same decision. This Ninth Circuit Court of Appeals recognizes in its opinion, that no other Court in this land has so interpreted the decision of *Mascuilli v. United States*, *supra*. (See opinion filed March 18, 1969, p. 6, footnote 4 wherein this Ninth Circuit Court of Appeals sets forth five District Court decisions all of which interpreted *Mascuilli v. United States* contrary to this Ninth Circuit Court of Appeals.)

For cases contrary to this Ninth Circuit Court of Appeals holding in this matter see: *Mascuilli v. United States*, 387 U.S. 237, 1967 AMC 1702; *Moore-McCormack Lines v. Candiono*, 390 U.S. 1027, 88 S. Ct. 1416; *Skibinski v. Waterman*, 387 U.S. 912, 87 S. Ct. 2027; *Candiono v. Moore-McCormack Lines*, 382 F. 2d 961; *Venable v. A-S Det Furenedede Dampskibssels-Kab*, 399 F. 2d 347; *Skibinski v. Waterman*, 360 F. 2d 539; *Alexander v. Bethlehem Steel*, 382 F. 2d 963; *U.S. v. Bookbinder* (United States District Court E.D. Pennsylvania), 291 F. Supp. 84, 87; *Buljanovic v. Grace Line* (S. Ct. in the State of New York), 1968 MC 1483, 1484; *Sandoval v. Mitsui Sempaqu K.K. Tokyo*, 288 F. Supp. 377, 382 (D. Canal Zone, 1968); *Hanks v. California Company*, 280 F. Supp. 730, 739 (W.D. La. 1967); *Jackson v. SS. Kings Point*, 276 F. Supp. 451, 452 (E.D. La. 1967); *Wilson v. Societa Italiana de Armamento*, 279 F. Supp. 945, 948 (E.D. La. 1968).

In addition, this Ninth Circuit Court of Appeals based its interpretation of *Mascuilli v. U.S.*, *supra*, on excerpts taken from a Petition for Certiorari filed

with the United States Supreme Court. The excerpts referred to by this Ninth Circuit Court of Appeals appear nowhere in this record on Appeal nor in any briefs submitted by either Appellants or Appellees. Appellant is not able to argue this Ninth Circuit Court of Appeals' conclusions relative to the material excerpted from the briefs in certiorari. Appellant is not in possession of the briefs filed in the *Mascuilli* decision.

Furthermore, this Ninth Circuit Court of Appeals decision runs directly contrary to what in fact transpired when the United States Supreme Court in *Mascuilli v. U.S.* denied certiorari with regard to the Court of Appeals' decision in *Mascuilli* (358 F. 2d 133).

In *Mascuilli v. U.S.* (387 U.S. 237) the United States Supreme Court sets forth the facts relied upon by the United States Supreme Court as those appearing in *Mascuilli v. U.S.*, 358 F. 2d 133.

In *Mascuilli v. U.S.*, 358 F. 2d 133, the only facts and/or conclusions set forth in that opinion are as follows: “. . . the findings of fact by the trial court that the vessel and its equipment were in a seaworthy condition at all times throughout the loading operations and that the accident was caused solely by the negligent operation of the stevedoring crew as stated in finding of fact number 35, are not clearly erroneous”.

Finding number 35 provided: “in summary, the court finds that the vessel and all of its equipment was in a seaworthy condition at all times and remained so throughout the entire loading operations.

The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur so instantaneously that the third officer was unable to warn anyone or prevent its happening". (See, *Mascuilli v. United States*, 241 F. Supp. 354, 362.)

It is submitted that any possible, logical, conclusion to be derived from the Court's opinion in *Mascuilli v. U.S.*, 387 U.S. 237, is that the United States Supreme Court expressly reversed the United States District Court finding number 35 and held that a condition of unseaworthiness existed in those circumstances where a vessel and all of its equipment were in a seaworthy condition, at all times, and that the accident in question was solely caused by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause "the accident to occur so instantaneously that the third officer was unable to warn anyone or prevent its happening".

To re-emphasize this explicit holding, the United States Supreme Court denied certiorari in *Moore-McCormack Line v. Candiono*, 390 U.S. 1027, 88 S. Ct. 1416. In *Candiono v. Moore-McCormack Lines*, 382 F. 2d 961, there was but one issue presented on that appeal. The issue presented and decided was "the doctrine of operational negligence is not a factor in determining liability of a ship owner to a longshoreman for injuries aboard ship during loading and unloading operations". It is submitted that if confusion or misinterpretation existed relative to the United States Supreme Court's conclusion in *Mascuilli v.*

United States, that alleged confusion was eliminated by that same Court's denying certiorari in the case of *Moore-McCormack Lines v. Candiono, supra*.

It is submitted that the test for determining seaworthiness has clearly been set forth as follows:

Was the equipment, whether defective or not, unsafe and therefore unfit because of the manner in which it was actually used. (See, *Candiono v. Moore-McCormack Lines*, 251 F. Supp. 654, 656; *Mahnich v. Southern S.S. Company*, 321 U.S. 96, 104, 64 S. Ct. 455, 459; *Waldron v. Moore-McCormack Lines*, 386 U.S. 724, 726, 87 S. Ct. 1410, 1412).

In conclusion, it is submitted that the United States Supreme Court resolved the issue presented here on Appeal in favor of Appellant in *Waldron v. Moore-McCormack Lines*, 386 U.S. 724; *Masculi v. United States*, 387 U.S. 237; *Moore-McCormack Lines v. Candiono*, 390 U.S. 1027, 88 S. Ct. 1416.

In *Waldron v. Moore-McCormack Lines* the Court stated: "The basic issue here is whether there is any justification, consistent with the broad remedial purposes of the doctrine of unseaworthiness, for drawing a distinction between the ship's equipment on the one hand, and its personnel on the other". (See, *Waldron, supra*, 386 U.S. 724, 726, 87 S. Ct. 1410, 1411.) The Supreme Court held there was no such distinction; concluding that a negligent acting crew member is synonymous with defective equipment, as regards the doctrine of seaworthiness.

In *Masculi v. U.S.*, the United States Supreme Court held this same conclusion results when the neg-

ligent party is a longshoreman as opposed to a crew member.

In *Moore-McCormack Lines v. Candiono*, 390 U.S. 1027, the Supreme Court of the United States merely reiterated its previously held conclusion: that the negligence of a crew member or longshoreman, while acting within the course and scope of his employment, proximately injuring a fellow crew member, creates liability as to the vessel in question because such negligent act constitutes an unseaworthy condition, at the time and in the manner said act was performed.

III.

THE CONCEPT OF AGENCY UNDER THE F.E.L.A. AND THE JONES ACT IS NOT SYNONYMOUS WITH DEGREE OF CONTROL AS WAS THE CASE AT COMMON LAW

This Ninth Circuit Court of Appeals held that the concept of "agency" as used in the F.E.L.A. and the Jones Act is synonymous with the term "agency" as used in common law.

The United States Supreme Court held in *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 427; 79 S. Ct. 445, 447.

"The work of loading and unloading is historically 'the work of the ship's service'. *Seas Shipping Company v. Sieracki*, *supra*, 328 U.S. at p. 96, 66 S. Ct. at p. 878.

This protection against unseaworthiness imposes a duty which the owner of the vessel cannot delegate. (*Seas Shipping Company v. Sieracki*, *supra*,

328 U.S. at p. 100, 66 S. Ct. at p. 880.) Unseaworthiness extends not only to the vessel but to the crew (*Boudoin v. Lykes Brothers Steamship Company*, 348 U.S. 336, 75 S. Ct. 382, 99 Lawyers Edition 354) and to appliances that are appurtenant to the ship. *Mahnich v. Southern SS. Company*, 321 U.S. 96, 64 S. Ct. 455, 88 Lawyers Edition 561. And as to appliances, the duty of the shipowner does not end with supplying them; he must keep them in order. *Id.*, 321 U.S. at p. 104, 64 S. Ct. at p. 459; *The Osceola*, 189 U.S. 158, 175, 23 S. Ct. 483, 487, 47 Lawyers Edition 760. The shipowner is not relieved of these responsibilities by turning control of the loading or unloading of the ship over to a stevedoring company."

Because the duty of the shipowner is non-delegable and continuous and does not end by transferring this historical unloading duty to stevedores, the same United States Supreme Court in *Hobson v. Texaco Incorporated*, 383 U.S. 262, 86 S. Ct. 765, held that the duty of the ship as to rendering medical attention to injured crew members also cannot be delegated to a taxicab driver and thus avoid the non-delegable duty.

Supreme Court of the United States in *Hobson v. Texaco, supra*, specifically held that the Federal Employers Liability Act "is a radical departure from the rules of common law" with regard to the interpretation to be made of the term "agency". (*Hobson v. Texaco, supra* at 86 S. Ct. 766.)

The Ninth Circuit Court of Appeals concluded that the stevedore, while unloading defendant's vessel, was

not the "agent" of defendant American President Lines because American President Lines did not select the stevedoring company, nor contract with the stevedoring company, nor had an ownership interest in said stevedoring company.

It is submitted the test for agency is not one of selection, contract or financial interest. As set forth above, the question of agency turns on the fact that the shipowner has a non-delegable duty which cannot be avoided by relinquishing its historical obligation to unload and discharge cargo to a stevedoring company.

The District Court, trial Court, specifically held that the contracts entered into between defendant American President Lines, the United States Government and Matson Terminals "were not regarded by the trial judges as having significance insofar as the judgment reached was concerned". (See finding of fact number 3.)

Furthermore, this Ninth Circuit Court of Appeals fails to recognize that contracts were in fact entered into between American President Lines and the United States Government wherein it was contractually required that a stevedoring company be provided for the purpose of discharging cargo from American President Lines vessel. Thus Matson Terminals *was* contractually performing stevedoring acts on board defendant's vessel pursuant to and as a result of a contract entered into between American President Lines and the United States Government. Had American President Lines not so contracted, the neg-

ligent stevedore in question would not have been aboard at the time of the accident in question and would not have been operating the Gantry Crane in a negligent manner as found by the District Court.

This Ninth Circuit Court of Appeals fails to recognize that the negligent stevedore was assisting in performing the contractual obligation of American President Lines to discharge the cargo from the vessel in question.

The Court's opinion therefore is contrary to the law, the findings and the evidence.

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R. JAY ENGEL,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATION OF COUNSEL

I, R. Jay Engel, counsel for the petitioner certify that the foregoing petition for rehearing is well founded for the reasons set forth above. I further certify that this petition for rehearing is not interposed for delay.

R. JAY ENGEL,
*Attorney for Appellant
and Petitioner.*

In the
United States
Court of Appeals
For the Ninth Circuit

No. 22413

STATE OF WASHINGTON, *Appellant*

v.

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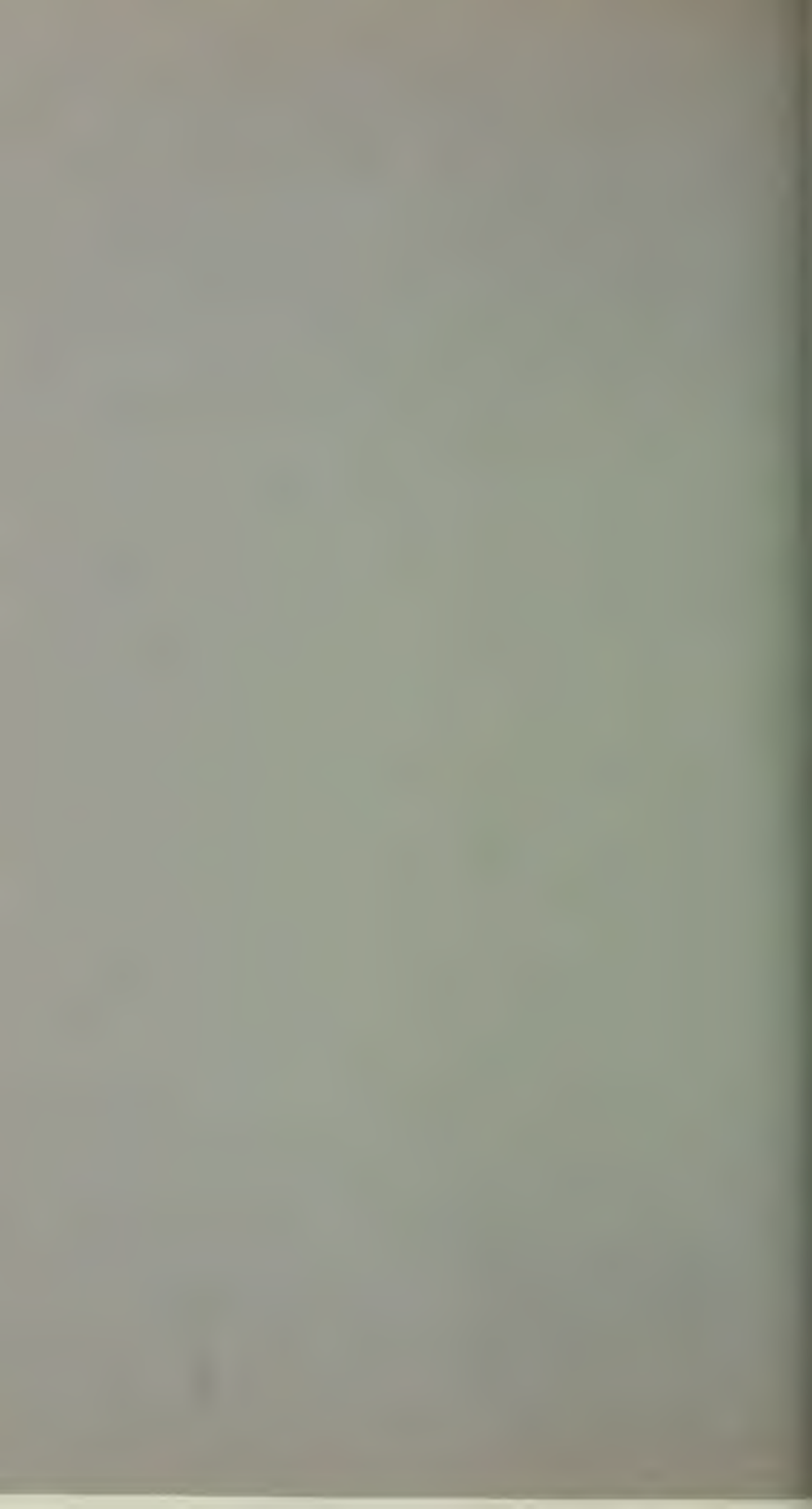
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In the
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For the Ninth Circuit

No. 22413

STATE OF WASHINGTON, *Appellant*

v.

STEWART L. UDALL, Secretary of the
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ON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF FOR THE APPELLANT

OPINION BELOW

The District Court filed no formal opinion. The Court did render an oral decision on May 19, 1967, which was made a part of its July 7, 1967, Order of

¹The additional appellees, who with the Secretary were defendants below, are Floyd E. Dominy, *Commissioner, U. S. Bureau of Reclamation*; H. T. Nelson, *Regional Director, U. S. Bureau of Reclamation*; W. E. Rawlings, *Columbia Basin Project Manager, U. S. Bureau of Reclamation*; the United States; and the South Columbia Basin Irrigation District, a public corporation of the State of Washington. (R. 2-3.)

Dismissal and Final Judgment (R. 149-58) which is set out as Appendix A, *infra*, pp. 36-41 (with formal parts omitted).

JURISDICTION

This is an appeal from a final judgment (R. 150-58) entered July 7, 1967, pursuant to Fed. R. Civ. P. 54(b) by the U. S. District Court, District of Washington, Northern Division, dismissing the State of Washington's complaint against the defendant United States and its officers. This Court has jurisdiction under 28 U.S.C. § 1291.

The state's claims arise under the Columbia Basin Project Act of October 1, 1962, Public Law 87-728, 76 Stat. 677, set out as Appendix B, *infra*, pp. 42-46, and § 46 of the Omnibus Adjustment Act of May 25, 1926, 44 Stat. 629, as amended, 70 Stat. 524 (43 U.S.C. § 423e), set out as Appendix C, *infra*, pp. 47-49.

By its complaint (R. 1-33) the state sought a declaratory judgment, injunctive relief, and relief in the nature of mandamus in the District Court under the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706;² 28 U.S.C. § 1361, which authorizes relief in the nature of mandamus against officers of the government; the Declaratory Judgment Act, 28 U.S.C. § 2201; and 28 U.S.C. § 1331, the "federal question" statute.³ The state also sought a judgment

²Formerly codified as 5 U.S.C. § 1009.

³As to its claim for non-monetary relief, the state alleged that the matter in controversy exceeded the sum or value of \$10,000, exclusive of interest and costs (R. 2).

for damages against the United States under the Tucker Act, 28 U.S.C. § 1346.⁴

The defendant United States and its officers, by motion to dismiss (R. 35-36), challenged the District Court's jurisdiction over the state's claim. After hearing, the Court below announced its oral decision (R. 152-58, see *infra*, pp. 39-41. The State filed a petition for rehearing, reconsideration, and alternate relief (R. 132-44). On July 7, 1967, the Court entered an order denying the petition (R. 148) and an order and final judgment⁵ dismissing the complaint as to the United States and its officers (R. 149-58). The state's notice of appeal (R. 159-60) was filed August 30, 1967.

STATEMENT OF THE CASE

Introduction

The State of Washington is owner of Farm Units 34 and 35, Irrigation Block 23, Columbia Basin Project, Washington. These lands lie within the South Columbia Irrigation District⁶ and have

⁴Damages claimed under the Tucker Act do not exceed \$10,000 (R. 2); by its memorandum of May 5, 1967, the state expressly waived all claims for damages in excess of the District Court's jurisdictional limits (R. 119-20). This was done to preserve the Court's jurisdiction within the rule announced in *United States v. Johnson*, 153 F.2d 846 (9th Cir. 1946).

⁵The Court, pursuant to Fed. R. Civ. P. 54(b), determined that there was no just reason for delay and directed entry of final judgment as to all defendants other than the South Columbia Basin Irrigation District.

⁶The South Columbia Basin Irrigation District is one of the three irrigation districts within the Columbia Basin

been assessed by the district. In July of 1966, after paying all current assessments against Farm Units 34 and 35, the state made demand for the delivery of irrigation water to all irrigable acreage within each tract. The demand was referred by the district to W. E. Rawlings, Columbia Basin Project Manager, U. S. Bureau of Reclamation. (R. 3-4, 13-14).

By letter of August 5, 1966, the project manager ruled that inasmuch as Farm Units 34 and 35 contained land in excess of 160 irrigable acres,⁷ water from the Columbia Basin Project would not be delivered to more than 160 acres of irrigable land unless, as to those lands in excess of 160 acres, the state would execute a recordable contract proposed by the U. S. Bureau of Reclamation. Under the terms of this recordable contract irrigation water would be made available to all of Farm Units 34 and 35, provided that the state agreed (R. 26-32) :

1. To authorize a binding appraisal by the Secretary of Interior of all irrigable lands in excess of 160 acres within the units;

2. To offer for sale, within five years and at the Secretary's appraised price, such irrigable lands in excess of 160 acres; and

3. To constitute the Secretary of Interior its

Project. It is organized under state irrigation law and has entered into the repayment contract with the United States authorized by Public Law 87-728 (App. B, *infra*, pp. 42-46). See S. Rep. 2002, 87th Cong., 2d Sess. (1962), and *In re South Columbia Basin Irrigation Dist.*, 63 Wn.2d 115, 385 P.2d 715 (1963).

⁷Farm Unit 34 contains 131.5 irrigable acres; Farm Unit 35 contains 120.8 irrigable acres (R. 14).

agent with the non-revocable and exclusive right to sell such irrigable lands in excess of 160 acres that remain unsold by the state from and after October 1, 1972.

The state refused to execute the recordable contract proposed by the Columbia Basin Project manager. Its refusal was based upon the fact that the covenants demanded of the state under the proposed contract violated the provisions of the state constitution and Enabling Act. (R. 78.) Title to Farm Units 34 and 35 vested in the state at the time of statehood pursuant to the common school land grant made by Congress under section 10 of the state Enabling Act, ch. 180, 26 Stat. 676 (1889). Consequently disposal of such lands by the state is restricted by section 11^s of the Enabling Act and by article 16, sections 1 and 2, of the Washington Constitution. (R. 3-5, 7-8.)

The pertinent provision of Enabling Act § 11 (as it now reads and has read since the amendment of May 7, 1932, 47 Stat. 150) reads as follows:

That all lands granted by this [Enabling] Act shall be disposed of only at public sale after advertising—tillable lands capable of producing agricultural crops for not less than \$10 per acre and lands principally valuable for grazing purposes for not less than \$5 per acre. . . .

The pertinent provisions of article 16 of the Wash-

^sSection 11 has been amended by Congress on numerous occasions: 42 Stat. 158 (1921); 47 Stat. 150 (1932); 52 Stat. 1198 (1938); 62 Stat. 170 (1948); 66 Stat. 283 (1952); 76 Stat. 91 (1962); —Stat. — (Public Law 90-41, June 30, 1967).

ington Constitution relating to school and granted lands are these:

§ 1 *Disposition Of.* All the public lands granted to the state are held in trust for all the people and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

§ 2 *Manner and Terms of Sale.* None of such lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder, the value thereof, less the improvements shall, before any sale, be appraised by a board of appraisers to be provided by law, the terms of payments also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of the said land. . . .

Wrongful Refusal to Deliver Water

By its complaint the state alleged that refusal of the officers of the United States to deliver water to all irrigable lands within Farm Units 34 and 35 was without lawful justification, constituted arbitrary and capricious action, and violated a plain legal duty. The state specifically averred that its school lands were exempt from the 160 acre ("excess land") limitations of the Federal Reclamation Act

of June 17, 1902 (32 Stat. 388), as amended and supplemented. (R. 8.) Specifically, the state contended⁹ that the Columbia Basin Project Manager had erroneously applied the "excess land" or 160 acre limitation of 43 U.S.C. § 423e (App. C, *infra*, pp. 47-49) to granted school lands.

The plain reading of the applicable portion of § 423e supports the state's contention. The pertinent language reads:

. . . Such contract or contracts with irrigation districts . . . [for the repayment of the cost of constructing, operating, and maintaining federal irrigation works] shall further provide that all irrigable land *held in private ownership* by any one owner in excess of one hundred sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sales prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; . . . [Emphasis ours.]

Furthermore, the history of congressional legislation concerning the Columbia Basin Project negates any congressional intent to impliedly authorize the Secretary of the Interior to administratively extend the excess land restrictions of private ownership to

⁹State's memorandum of March 30, 1967 (R. 67-73).

lands Congress had granted to the state for the support of common schools.

The matter can be best explained by reviewing the legislation governing the Columbia Basin Project as it existed prior to October 1, 1962, and enactment of Public Law 87-728 (App. B, *infra*, pp. 42-46) and as it existed after enactment of Public Law 87-728.

The Columbia Basin Project Act

Prior to enactment of Public Law 87-728 the Columbia Basin Project was different from all other federal reclamation projects. See 16 U.S.C.A. §§ 835-835i (1960 ed.); S. Rep. No. 2002, 87th Cong., 2d Sess. (1962). Three important innovations in federal reclamation law that were not found elsewhere in other reclamation projects were these: (1) platting of *all* lands within the project in farm units; (2) providing for recordable contracts for non-excess lands as well as excess lands; and (3) requiring state participation as a prerequisite to delivery of any project water.

Farm Units. The Congress directed that the Secretary of the Interior should plat all lands within the Columbia Basin Project into farm units of sufficient size, locaton, soil, and topography to support an average-size family. 16 U.S.C.A. § 835a(b) (ii).¹⁰ This first innovation in federal reclamation law was truly remarkable because the direction of Congress called for a platting of private

¹⁰Repealed by Public Law 87-728, § 3.

lands and state lands in addition to the platting of lands which the government itself owned.

Recordable Contracts. The second innovation under the Columbia Basin Project Act concerned the terms that were to be included in recordable contracts. The act required that every landowner, as a condition for the delivery of project water to any of his lands (non-excess as well as excess) must sign a recordable contract containing, in addition to the usual terms, an agreement on his part to conform his land by purchase, sale, or exchange to the established farm units platted by the Secretary of the Interior. 16 U.S.C.A. § 835a(c).¹¹ Of course if lands were to be purchased or sold the Secretary of the Interior's appraisal limited the price.

State Participation. The third innovation of the pre-1962 Columbia Basin Project Act was a limitation restricting the delivery of project water to private lands until the state had agreed to subject its lands to the foregoing farm unit and recordable contract provisions. 16 U.S.C.A. § 835c-3.¹² Of course this innovation called for a modification of the public sale, minimum price, and appraisal requirements of both the Enabling Act § 11 and the state constitution, art. 16, §§ 1 and 2, quoted *supra*, pp. 5 and 6.

Congress expressly waived application of the Enabling Act provisions, 16 U.S.C.A. § 835c-5¹³ but modification of the state constitution proved to be

¹¹Repealed by Public Law 87-728, § 3.

¹²Repealed by Public Law 87-728, § 3.

¹³Repealed by Public Law 87-728, § 3.

another matter. By 1950 Congress recognized that the necessary amendment to the state constitution would not be forthcoming, and instead, Congress amended the project act to grant state school and granted lands a partial exemption from the statutory recordable contract provisions. S. Rep. 2498, 81st Cong., 2d Sess. (1950).¹⁴

The partial exemption of state lands from the original provisions of the Columbia Basin Project Act was granted by a measure entitled "An Act to amend the Columbia Basin Project Act with reference to State lands,"¹⁵ set out as Appendix D, *infra*, pp. 50-51. Under this 1950 act the purchaser of state school and granted lands would not be disqualified from executing a recordable contract by reason of the amount of the purchase price paid the state where the state sale was made pursuant to a program agreed to by the Secretary of Interior and the state. By this device the public sale and appraisal procedures required by the Washington Constitution would be complied with. S. Rep. No. 2498, 81st Cong., 2d Sess. (1950).

The 1950 act was fully implemented in 1951 by the execution of a formal "Agreement Relating to Disposal of State Lands in the Columbia Basin Project, Washington."¹⁶ The Acting Regional Director of

¹⁴1950 U.S. Code & Cong. Serv. 3955.

¹⁵Public Law 851, 81st Cong., 2d Sess., 64 Stat. 1074 (1950).

¹⁶The agreement is set forth in full as an exhibit to the complaint (R. 17-25) and, except for omitted acknowledgments and an annexed form of recordable contract to be executed by a purchaser of state lands, is also set out in full as Exhibit E, *infra*, pp. 52-56.

the Bureau of Reclamation executed the agreement for the Secretary of Interior; the Commissioner of Public Lands executed it for the state. From 1951 to enactment of Public Law 87-728¹⁷ on October 1, 1962, the United States and the state acted upon this contract. Since October 1, 1962, the Secretary of Interior and his subordinate officers in the Bureau of Reclamation have declined to act under the 1951 contract or to acknowledge its continued validity. (R. 6.)

**The Columbia Basin Project Act
and Public Law 87-728**

The broad purpose of Public Law 87-728 was to do away with the special innovations of the original Columbia Basin Project Act which we have summarized above and to provide that henceforth the project would be governed by the general Federal Reclamation Act of June 17, 1902, as amended. In addition Public Law 87-728 repealed the statutory basis for the Secretary of Interior's 1951 agreement with the state for the disposal of state lands.¹⁸ By reading this repeal against the backdrop of broad congressional purpose, the Secretary of Interior finds an intent on the part of Congress to terminate all rights of the state under its 1951 agreement with the United States.

However, assuming the Secretary correctly in-

¹⁷See Appendix B, *infra*, pp. 42-46.

¹⁸Public Law 87-728, § 3; 16 U.S.C.A. § 835-1 (Supp. 1966). See S. Rep. 2002, 87th Cong., 2d Sess. (1962).

interprets the will of Congress, it then becomes clear that Congress intended to deny the Secretary the right to classify school lands as "land held in private ownership" and thus subject to the excess land restrictions of 43 U.S.C. § 423e (see, *supra*, p. 7). These considerations compel this conclusion:

1. School lands were granted to the State of Washington because Congress acted upon a long standing policy of generous support for public education. Orfield, *Federal Land Grants to the States* 36-52 (1915); Hibbard, *A History of the Public Land Policies* 305-319 (1924); cf. *Johanson v. Washington*, 190 U.S. 179 (1903). State school lands are therefore lands dedicated to a special public purpose, *Soundview Pulp Co. v. Taylor*, 21 Wn.2d 261, 150 P.2d 839 (1944), and remain lands subject to a federal interest until such time as the trust imposed by Congress is extinguished in accordance with federal law. See *Lassen v. Arizona Highway Dep't*, 385 U.S. 458 (1967). As such, state school lands have not been deemed subject to the general excess land restrictions of 43 U.S.C. § 423e in other federal projects within the State of Washington, and would appear to fall within the general exemption for public purposes that the Secretary of Interior has recognized in other states where publicly owned lands have been included in federal reclamation projects, *Acreage Limitation Policy—A Study Prepared by the Department of Interior* 21, 88th Cong., 2d Sess. (Comm. Print 1964).

2. Congress itself appears in the past to have assumed that the acreage limitations applicable to state lands under the original Columbia Basin Project Act were a special departure from the acreage limitations of the general federal reclamation laws. In 1959, when Congress granted a special exemption under the original act to permit the operation of the Washington State University experimental farm, Public Law 86-52, 73 Stat. 87 (1959), the report of the House Committee on Interior and Insular Affairs supported the measure, saying:¹⁹

Under the Columbia Basin Project Act, *unlike the general Federal reclamation laws*, the limitation on the acreage to which water may lawfully be delivered is applicable to State-owned lands as well as private land. In the absence of such legislation as H.R. 1306, water could therefore be delivered to no more than 160 acres of State-owned land. [Emphasis ours.]

4. Denial of water to "excess lands" presently in state ownership within the Columbia Basin Project, in addition to termination of vested rights of the state under its 1951 contract with the government, would require provision for just compensation to the state. The failure of Congress to make such provisions suggests that Congress expected that state school lands would receive irrigation water so that no payment for lost contract rights would be necessary.

5. Denial of water to "excess lands" presently in

¹⁹Amending Section 2(b) of the Columbia Basin Project Act, 1-2, H. Rep. 176, 86th Cong., 1st Sess. (1959).

state ownership, in addition to termination of state rights under its 1951 contract with the government, would be tantamount to exclusion of the state lands from the state organized irrigation districts within the Columbia Basin Project. Under Wash. Rev. Code § 87.03.240 assessments may be levied by state irrigation districts only on the basis of special benefits. If the state school lands are not presently eligible to receive water and cannot be made eligible, no showing of special benefits is possible and no assessments can be levied against the lands.²⁰ *Cf. Northern Pacific Ry. v. Walla Walla County*, 116 Wash. 684, 200 Pac. 585 (1921).

**Relief Sought by the State
in District Court**

The state sought alternate relief under its complaint filed in the District Court. First, the state sought a judicial determination that all its irrigable lands in Farm Units 34 and 35, following enactment of Public Law 87-728, are eligible to receive Columbia Basin Project water without the acreage limitation under 43 U.S.C. § 423e that applies to "land

²⁰In oral argument before the District Court, counsel for the South Columbia Irrigation District advised the Court that the Secretary of Interior presently requires the district to make payments to the government under the districts' repayment contract without deductions that would be appropriate if the Secretary deemed the state lands excluded from the Columbia Basin Project by Public Law 87-728. Since the state has paid no assessments on lands other than Farm Units 34 and 35, the private land owners in the district bear the additional burden of paying these costs until the time the school land problem is resolved.

held in private ownership.” (R. 9-10, 67-68.)²¹ For this purpose the state alleged that the District Court had jurisdiction to grant a declaratory judgment, injunctive relief, relief in the nature of mandamus, and damages (whichever might be appropriate) under the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706; 28 U.S.C. § 1361, authorizing relief in the nature of mandamus against officers of the government; the Declaratory Judgment Act, 28 U.S.C. § 2201; 28 U.S.C. § 1331, the “federal question” statute; and the Tucker Act, 28 U.S.C. § 1346(a) (2).²² (R. 2, 9-10.)

Second, if judicial vindication of the state’s claim to water cannot be achieved (by reason of an adverse decision on the merits or because of want of jurisdiction in the District Court to make a decision on the merits), the state sought alternate relief against the South Columbia Basin Irrigation District, i.e., cancellation of existing assessments, an injunction against future assessments, and a return of assessments already paid on “excess lands.” (R. 11-12, 68-69.) However, the matter of alternate relief against the South Columbia Basin Irrigation District is still pending before the District Court²³ and is not ripe for review on this appeal.

²¹The state’s prayer for a declaratory judgment, binding on all parties, declaring the rights, status, and other legal relations of the parties under the 1951 contract between the United States and the state was abandoned in the District Court and thus is not urged in this Court.

²²See, *supra*, p. 3 n.4.

²³Pursuant to Fed. R. Civ. P. 54(b) the District Court entered final judgment dismissing the state’s complaint against the United States and its officers, but not against the South Columbia Basin Irrigation District (R. 148-58).

Action by the District Court

The District Court, although impressed with the importance of a need for resolution of the issue, made no ruling on the merits of the state's claim. Instead, the Court sustained the challenge to its jurisdiction made by the United States and its officers through a motion to dismiss the state's complaint as to them. (R. 148-58; see, *infra*, App. A, pp. 36-41.)

The Court ruled (1) that the sovereign immunity doctrine of *Dugan v. Rank*, 372 U.S. 643 (1963), barred relief under all but the Tucker Act claim; (2) that the Tucker Act claim was in excess of the District Court's statutory jurisdiction because the state's claim for damages to Farm Unit 35 could not be severed from its claims to damages to other state-owned tracts within the South Columbia Basin Irrigation District.²⁴

²⁴The District Court in its oral opinion suggested that the state may not have exhausted its administrative remedies before commencing suit (R. 154; App. A, *infra*, p. 40). However, the Court immediately indicated that exhaustion probably would be fruitless in the present case, *ibid.* Thereafter the matter was directly raised and argued by the state under its petition for rehearing and reconsideration (R. 132-36), but neither the order denying the petition (R. 148) nor the formal judgment of dismissal makes further mention of the matter.

SPECIFICATION OF ERRORS

The District Court erred in dismissing the state's complaint against the defendant United States and its officers because :

1. The District Court is vested with jurisdiction under the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706, to review an administrative determination by the Secretary of Interior and his subordinate officers that state school lands (Farm Units 34 and 35) are subject to the acreage limitations of 43 U.S.C. § 423e.

2. The District Court is vested with jurisdiction under 28 U.S.C. § 1361 (the mandamus statute) to compel officers of the United States to perform a duty owed the state, i.e., to compel delivery of water to all irrigable acreage in Farm Units 34 and 35.

3. A claim under the Tucker Act, 28 U.S.C. § 1346(a)(2), for damages to Farm Unit 35 is an independent cause of action without regard to the fact that the state may have additional claims for damages to different and separate parcels of land within the South Columbia Basin Irrigation District and the Columbia Basin Project.

SUMMARY OF ARGUMENT

1. An administrative determination of the defendant officers of the United States is reviewable by action in the District Court under the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706, because "the Act makes a clear waiver of sovereign immunity in actions to which it applies." *Estrada v. Ahrens*, 296 F.2d 698 (5th Cir. 1961); *cf. Adams v. Witmer*, 271 F.2d 29, 34-35 (9th Cir. 1958), and the "generous review provisions" must be given a "hospitable" reception, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967).

In this circuit it is well established by *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), and prior cases, that the Administrative Procedure Act grants to District Courts jurisdiction to review administrative decisions adverse to a private party even where the government or its property may have been affected by the decision.

Argument about the scope of the Administrative Procedure Act appears *infra*, pp. 20-27.

2. The 1962 "mandamus" statute, 28 U.S.C. § 1361, authorizes district court orders requiring affirmative action by government officers. Since such a statute was undoubtedly intended to confer an effective jurisdiction, it therefore contains an implied consent to suit so far as such consent is necessary in order for a District Court to exercise its jurisdiction to compel action by an officer of the government. Furthermore, the federal courts are giving the new

mandamus statute a liberal construction, particularly as to the scope of matters reviewable under it. *E.g.*, *Walker v. Blackwell*, 360 F.2d 66 (5th Cir. 1966); *Medoff v. Freeman*, 246 F. Supp. 125 (D. Mass. 1965), *aff'd*, 362 F.2d 472 (1st Cir. 1966); *Ashe v. McNamara*, 335 F.2d 277 (1st Cir. 1965).

Argument about the scope of the mandamus statute appears *infra* pp. 27-29.

3. There has been no splitting of the state's action for damages under the Tucker Act, 28 U.S.C. § 1346(a)(2). The state here seeks damages to Farm Unit 35. It has no present cause of action for any of its twelve other parcels of land within the South Columbia Basin Irrigation District (or other lands within the Columbia Basin Project) because payment of assessments, a condition precedent to delivery of water, has not been made. But even if the state presently had a right to seek damages for non-delivery of water to these other lands, its right would constitute a separate and different cause of action because the lands are separate and different. *Mendez v. Bowie*, 118 F.2d 435 (1st Cir.), *cert. denied*, 314 U.S. 639 (1941); *Roberts v. Northern Pac. R.R.*, 158 U.S. 1 (1895); *Ross v. Miller*, 252 U.S. 697 (4th Cir. 1918); *United States v. Pan-American Petroleum Co.*, 55 F.2d 753 (9th Cir.), *cert. denied*, 287 U.S. 612 (1932); *Fessenden v. Barrett*, 50 Fed. 690 (D.N.H. 1891).

Argument concerning this issue appears *infra*, pp. 30-35.

ARGUMENT

Jurisdiction Under the Administrative Procedure Act

The District Court has jurisdiction to review the administrative determination by the Secretary of Interior and his subordinate officers that state school lands (Farm Units 34 and 35) are subject to the acreage limitations of 43 U.S.C. § 423e because the Administrative Procedure Act § 10 grants such jurisdiction. The pertinent provisions as presently codified are as follows:

[5 U.S.C. § 702. *Right of review*] A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

[5 U.S.C. § 703. *Form and venue of proceeding*] The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.

. . .

[5 U.S.C. § 704. *Actions reviewable*] Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . .

[5 U.S.C. § 706. *Scope of review*] To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

applicability of the terms of an agency action.

. . .

The doctrine of sovereign immunity has no application to suits commenced in accordance with the Administrative Procedure Act because "the Act makes a clear waiver of sovereign immunity in actions to which it applies." *Estrada v. Ahrens*, 296 F.2d 698 (5th Cir. 1961).²⁵ Thus the APA is to be read literally as an independent grant of jurisdiction in those cases where no other statute grants a right of judicial review.²⁶ As the Supreme Court pointed out earlier this year, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967) :

. . . The Administrative Procedure Act provides specifically not only for review of 'Agency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. § 704. The legislative material elucidating that seminal act [see *Administrative Procedure Act—Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. (1946)] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this

²⁵Cf. *Blackmar v. Guerre*, 342 U.S. 512, 516 (1951); Hart & Wechsler, *The Federal Courts and the Federal System* 1147 (1953).

²⁶*Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959), cited with approval in *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 n.7 (1963).

In *Foster v. Seaton* an administrative decision to deny a patent to mining claims on federal lands was reviewed in District Court under the Administrative Procedure Act. Prior to adoption of the act, a person wrongfully denied a patent to public land had an action for damages under the Tucker Act, but no other remedy. *United States v. Jones*, 131 U.S. 1 (1889).

Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. . . . Again in *Rusk v. Cort*, *supra*, [369 U.S. 367] at 379-380, the Court held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review. See also Jaffe, *Judicial Control of Administrative Action* 336-359 (1965).

The foregoing principles are fully accepted in this circuit.²⁷ See *Adams v. Witmer*, 271 F.2d 29, 34-35, *rehearing denied*, 291 F. 2d 38 (9th Cir. 1959); *Adams v. United States*, 318 F.2d 861 (9th Cir. 1963); *Mulry v. Driver*, 366 F.2d 544 (9th Cir. 1966); *Stewart v. Penny*, 238 F. Supp. 821 (D. Nev. 1965); *Denison v. Udall*, 248 F. Supp. 942 (D. Ariz. 1965); and *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966).²⁸

In *Adams v. Witmer*, 271 F.2d 29, *rehearing denied*, 291 F.2d 38 (9th Cir. 1959), this Court reviewed an administrative order of the Bureau of Land Management denying applications for patents

²⁷From other circuits, see, e.g., *Freeman v. Brown*, 342 F.2d 205 (5th Cir. 1965); *Amarillo-Borger Express v. United States*, 138 F. Supp. 411 (N.D. Tex. 1956) (three-judge court); *Northern States Power Co. v. Rural Electrification Administration*, 248 F. Supp. 616 (D. Minn. 1965); *Rechany v. Roland*, 235 F. Supp. 79 (S.D. N.Y. 1964).

²⁸Petition for certiorari was filed September 18, 1967 (No. 630). 36 Law Week 3193 (Nov. 7, 1967). From the note in *Law Week* setting forth the questions presented, it appears that the government does not seek to reverse this Court's holding that the Administrative Procedure Act § 10, 28 U.S.C. §§ 701-706, vests the courts with jurisdiction to review administrative determinations of private rights in public lands set aside as national forests.

to mining claims. Review was granted under the Administrative Procedure Act § 10 because this Court held that section 10 was a grant of consent to sue the government by complaint filed in the District Court.

In *Adams v. United States*, 318 F.2d 861 (9th Cir. 1963), the same mining claims that were before the Court in the first *Adams* suit were back before the Court, but in different litigation. After this Court's opinion in the first case, the government abandoned its administrative proceedings and filed suit in District Court to determine the validity of the claims. Adams filed a counter-claim seeking the broad review authorized by the Administrative Procedure Act. Again, over the government's objection, this Court ruled that the Administrative Procedure Act constituted a grant of jurisdiction to the District Court which was properly invoked by the defendants counter-claim in a suit initiated by the government.

In *Mulry v. Driver*, 366 F.2d 544 (9th Cir. 1966), the District Court dismissed a suit by resident physicians at the Long Beach Veterans Hospital challenging regulations of the hospital. Dismissal was granted on the ground that the suit was an unconsented action against the United States and therefore barred by the doctrine of sovereign immunity. This Court reversed, holding that jurisdiction was conferred on the District Court under the Administrative Procedure Act § 10.

In *Stewart v. Penny*, 238 F. Supp. 821 (D.

Nev. (1965), the District Court reviewed and reversed an administrative decision by the Bureau of Land Management to deny a homesteader a patent to public lands. The Court found jurisdiction to do so under the Administrative Procedure Act²⁹ despite the fact that the contest over issuance of the patent was initiated by the government.³⁰

In *Denison v. Udall*, 248 F. Supp. 942 (D. Ariz. 1965), the District Court ruled that it had jurisdiction under the Administrative Procedure Act to review the final decision of the Solicitor, Department of the Interior, denying patents on sixteen manganese mining claims.³¹

In *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), this Court reaffirmed its prior construction of the Administrative Procedure Act in *Adams v. Witmer* and *Adams v. United States*. The Court held that a holder of mining claims in a national forest, by counter-claim in the government's ejectment suit, could invoke the District Court's jurisdiction under the Administrative Procedure Act

²⁹Prior to adoption of the act, a person wrongfully denied a patent to public land had an action for damages under the Tucker Act, but no other remedy. *United States v. Jones*, 131 U.S. 1 (1889).

³⁰District Courts, of course, are vested with jurisdiction under the Administrative Procedure Act to review administrative decisions in contests over public lands initiated by a private citizen against a homestead entryman. *Unruh v. Udall*, 269 F. Supp. 97 (D. Nev. 1967).

³¹This Court expressly approved the holding of *Denison* in *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966).

to review an administrative determination that the claims were invalid.³²

The *Coleman* ruling is a particularly important decision. After this Court granted the government's petition for rehearing, the government made a determined effort to persuade the Court to reverse its construction of the Administrative Procedure Act. The government's jurisdictional contentions were stated in its *Supplemental and Replacement Brief* as follows:

1. The *Coleman* decision erroneously held that the Administrative Procedure Act authorized an award of specific relief against the United States. *Id.* at 10 and 17-20.

2. The *Coleman* decision erroneously held that the Administrative Procedure Act granted jurisdiction over cabinet officers. *Id.* at 10 and 21-22.

3. The *Coleman* decision erroneously held that public land disposal matters are reviewable under the Administrative Procedure Act. *Id.* at 12 and 40-42.

4. *Mulry v. Driver*, 366 F.2d 544 (9th Cir. 1966), erroneously held that the Administrative Procedure Act constituted a consent to sue the United States. *Id.* at 19 n.5.

³²The United States filed a petition for writ of certiorari with the United States Supreme Court on September 18, 1967. 36 Law Week 3193 (Nov. 7, 1967). See, *supra*, p. 22 n.28. As we there pointed out the petition apparently does not seek review of this Court's ruling that the Administrative Procedure Act granted jurisdiction to the District Court to review the administrative determination.

5. *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958), was wrong to hold that the Administrative Procedure Act conferred jurisdiction on District Courts. *Id.* at 25.

Despite the strong urging from the government, and after oral argument, this Court denied the petition for rehearing. Under these circumstances, which were called to the attention of the District Court,³³ there can be no question but that the District Court was authorized and required by the Administrative Procedure Act to hear and decide the state's claim for review of the administrative determination to apply 43 U.S.C. § 423e to state school lands. It is hornbook law that a District Court must follow the decisions of its own Court of Appeals. 1B Moore, *Federal Practice* ¶ 0.402[1], citing *United States v. Washington Water Power Co.*, 41 F. Supp. 119 (E.D. Wash. 1941), *cert. denied*, 320 U.S. 747 (1943), and similar case authority.

It should be noted that this Court's construction of the grant of jurisdiction to District Courts by the Administrative Procedure Act, following the filing of the *Coleman* opinion, has become the settled law in the Tenth Circuit. Four months before the *Coleman* opinion was filed the District Court for the District of Columbia had exercised jurisdiction under section 10 to review the Secretary of Interior's construction of an "oil and gas" reservation in favor of the government under a United States pa-

³³Petition for Rehearing, Etc. (R. 132, at 137-39).

tent. *Brennan v. Udall*, 251 F. Supp. 12 (D. Colo. 1966). The Tenth Circuit Court of Appeals upheld the lower Court's jurisdiction, saying:³⁴

At the outset, the Secretary challenges the jurisdiction of the court because the relief sought seeks to diminish the title of the United States in the lands, consequently it is a necessary party and has not consented to be sued. We agree with the trial court that the decision of the Secretary of the Interior adversely affects Brennan's title to the land in question and is reviewable under the Administrative Procedure Act. 5 U.S.C. § 1009, (now §§ 701-706). *Coleman v. United States*, 9 Cir., 363 F.2d 191; *Adams v. Witmer*, 9 Cir., 271 F.2d 29; *Denison v. Udall*, D.C. Ariz., 248 F. Supp. 942; *Stewart v. Penney [sic]*, D.C. Nev., 238 F. Supp. 821. Cf. *Homovich v. Chapman*, D.C. Cir. 191 F.2d 761.

**Jurisdiction Under the
Mandamus Statute
28 U.S.C. § 1361**

Since 1962 District Courts have been granted original jurisdiction in any action in the nature of mandamus against an officer or employee of the government. The applicable statute, 28 U.S.C. § 1361, reads:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty

³⁴*Brennan v. Udall*, — F.2d —, — (10th Cir. June 22, 1967). The opinion is not yet reported. Our quotation is taken from the copy of the opinion printed as an appendix to a petition for writ of certiorari (No. 634, Oct. Term, 1967) filed with the Supreme Court seeking review of the Court of Appeals' judgment on the merits.

owed to the plaintiff. [Public Law 87-748, § 1, 76 Stat. 744 (1962).]

The purpose of the statute is to give District Courts jurisdiction to issue orders compelling affirmative action by the agents of the government. Consequently these agents can be ordered to perform their duties and to make decisions, even in matters involving an exercise of discretion. S. Rep. No. 1922, 87th Cong., 2d Sess. (1962). Where the officer of the government has discretion, of course the District Court may not substitute its discretion for that of the officer. *Ibid.*

The mandamus statute is new. Despite this fact there have been numerous decisions by the courts to establish the right of the District Court to exercise jurisdiction under it to grant either supplemental or independent relief under the state's complaint here. In *Walker v. Blackwell*, 360 F.2d 66 (5th Cir. 1966), the Court ruled (and the government conceded) that the statute vested the District Court with jurisdiction to determine whether federal prison rules violated the right of prisoners to exercise their Muslim religion. In *Medoff v. Freeman*, 246 F. Supp. 125 (D. Mass. 1965), *aff'd*, 362 F.2d 472 (1st Cir. 1966), it was held that § 1361 granted jurisdiction for review of a probationary employee's contentions that he was entitled to a letter of charges, a right to reply, and an appeal for administrative reconsideration by the Department of Agriculture. In *Ashe v. McNamara*, 335 F.2d 277 (1st Cir. 1965), the court ruled that § 1361 conferred

jurisdiction on the District Court to compel the Secretary of Defense to reconsider a sentence imposed by a court-martial and to grant appropriate relief "in recognition that the court-martial sentence ordering the plaintiff's dishonorable discharge was invalid." 355 F.2d at 282.

Needless to say, sovereign immunity to suit cannot be asserted to defeat the express jurisdiction granted to District Courts by § 1361.³⁵ As Professor Byse explains in his article cited in footnote 35, 75 Harv. L. Rev. at 1511:

The reasoning is that if the grant of jurisdiction would be meaningless or ineffectual unless interpreted as a waiver of immunity, it is proper to conclude that the jurisdictional grant contains an implied consent to be sued. A conscientious federal judge might reasonably conclude that a statute which confers jurisdiction to compel a federal officer to perform his duty is intended to confer an effective jurisdiction, and that therefore the statute contains an implied consent to suit so far as such consent is necessary in order for the court to exercise its jurisdiction to compel performance of the officer's duty.

³⁵Byse, *Proposed Reforms in "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479, 1511 (1962), states:

The consent of the United States to be sued sometimes may be inferred from a statutory grant of original jurisdiction to the district courts.

His footnote in support of his statement reads:

See, e.g., 28 U.S.C. § 1346 (1958); *United States v. American Surety Co.*, 25 F. Supp. 700, 702 (E.D. N.Y. 1938). See also *Estrada v. Ahrens*, 296 F.2d 690, 698 (5th Cir. 1961); *Adams v. Witmer*, 271 F.2d 29, 34-35 (1958), *rehearing denied*, 291 F.2d 38 (9th Cir. 1959); Hart & Wechsler, . . . [The Federal Courts and the Federal System], at 1140-44.

**Damages Under the
Tucker Act**

The third jurisdictional issue before the Court on this appeal is whether the District Court should have heard and decided the state's claim under the Tucker Act, 28 U.S.C. § 1346(a)(2), for damages to Farm Unit 35. On the merits, this claim raises the same issue that is presented by the state's claim for non-monetary relief against the government's officers, *i.e.*, whether state school lands are "lands held in private ownership" so as to be ineligible for irrigation waters under 43 U.S.C. § 423e. On appeal, however, the only issue is whether there has been a "splitting" of the state's cause of action where the state in the present suit presses only its claim for damages to Farm Unit 35. Stated another way, the question is whether the state may maintain an action for damages to Farm Unit 35 and reserve for another day any damage claims to its remaining twelve parcels (R. 14) of irrigable lands it owns within the South Columbia Basin Irrigation District.

The state contends that it may. *First*, the state has no present cause of action for damages to other school lands within the South Columbia Basin Irrigation District or in the Columbia Basin Project. The state has paid assessments only on Farm Unit 34 and 35, but not on other irrigable lands. (R. 7, 14.) Until assessments are paid on its other lands

the state is not entitled to delivery of water irrespective of acreage restrictions.³⁶

Second, even if the state had a cause of action for damages to other parcels of school lands, these causes of action are *separate* causes of action regardless of issues of law common to them and the state's present claim as to Farm Unit 35. Claims involving separate parcels of real property are deemed separate "causes of action" in federal court despite the fact that the claims may involve common issues of law or fact. This issue is well illustrated by the following cases:

I.—*Mendez v. Bowie*, 118 F.2d 435 (1st Cir.), *cert. denied*, 314 U.S. 639 (1941). Prior to the institution of this suit the present defendants brought an action to quiet title to a right of way across real estate known as the Islote property. In that prior suit the Court upheld the present defendants' right of way and enjoined the present plaintiff from interfering with its use. Thereafter, and also prior to the present suit, the present plaintiff instituted a second suit concerning the Islote property. The second suit admitted the right of way but alleged its wrongful use. This second suit was subsequently dismissed on the ground that the extent of the right to use the right of way could have been litigated in the first suit. Because the causes of action were held to be the same in both suits, the first suit was *res judicata* as

³⁶Repayment Contract, as Amended, Between the United States and the South Columbia Basin Irrigation District, art. 30(b).

to all issues in the second suit. The instant suit, the third action between the parties, involved the same right of way deed. However it concerned a different parcel of land, known as the Mercedes property. As to this third suit the Court said, 118 F.2d at 441 :

The defendants maintain that the question of wrongful use [of the right of way] could have been raised in the first suit; that the second suit held that it was impossible, therefore, for the plaintiff to raise the question as to the Islote in the second suit; and that both of these decisions prevent him from raising the same point as to the Mercedes property on the ground that it is the same cause of action. We do not agree. The Mercedes property has never been involved in the prior two suits. It is an entirely different piece of land, and the alleged wrongful use of a right of way over it is a completely different cause of action from an action for such use of a right of way over a different piece of property even though the right of way was given over both properties by the same deed.

II.—*Roberts v. Northern Pac. R.R.*, 158 U.S. 1 (1895). The Northern Pacific acquired certain land by deed from a Wisconsin county. It brought this action in federal court to quiet title to a portion of such lands against the adverse claims by the defendants under a later county deed.

The defendants asserted that the railroad could not relitigate the validity of its conveyance from the county because that question had already been decided against it in a prior state court action involving lands similarly subject to both conveyances. The Supreme Court disagreed, holding that the causes of

action in the two suits were not the same because the lands were not the same. 158 U.S. at 26.

III.—*Ross v. Miller*, 252 U.S. 697 (4th Cir. 1918). This case involved two suits brought in two courts to set aside a release of judgment on the ground of fraud. The judgment creditor brought the first suit in a Virginia state court to enforce his judgment against land in that state. (His action was subsequently removed to federal court.) He brought his second suit, the instant case, in a West Virginia federal court to enforce his judgment against land in West Virginia.

The Circuit Court of Appeals answered the defendants' assertion that the first suit was a bar to the second by saying, 252 Fed. at 700:

We are also of opinion that the dismissal of plaintiff's bill cannot be sustained by the pendency of a similar suit, previously brought, in the state of Virginia. . . . True, both of them seek to set aside the same release and to enforce the same judgment, but the lands sought to be charged in one case are in Virginia, while in the other the lands sought to be charged are in West Virginia. . . . Such suits have the same parties, to be sure, and are based on the same judgment; but they differ in subject-matter because each is concerned with a separate piece of property.

IV.—*United States v. Pan-American Petroleum Co.*, 55 F.2d 753 (9th Cir.), *cert. denied*, 287 U.S. 612 (1932). This is a famous case arising out of the Teapot Dome scandal. A major issue in the case was whether the United States was entitled to bring a

second suit against Pan-American to set aside oil leases allegedly tainted with the same fraud that had been grounds for setting aside oil leases in a prior suit.

The court prefaced its remarks about the rule against splitting a cause of action by observing, 55 F.2d at 776:

Care should be taken to distinguish between 'transaction' and 'cause of action.' In the instant case, the evidentiary transaction that has given rise to the government's right to redress is, indeed, identical with the evidentiary transaction that tainted the leases involved in the first Pan-American Case; namely, the Fall-Doheny fraud.

Thereupon the court made an exhaustive review of the authorities which hold that a single "transaction" can give rise to a multitude of "causes of action." See 55 F.2d at 776-82. It followed its review of the authorities by summarizing the law regarding the defense of "split cause of action" and by holding that separate causes of action arose as to each tract of land subjected to a single oil lease. As a consequence, since the first Pan-American case involved different lands and leases, it was no bar to this second action. 55 F.2d at 782.

V.—*Fessenden v. Barrett*, 50 Fed. 690 (D. N.H. 1891). This action was brought to foreclose a mortgage on one of several separate parcels of land subject to the mortgage. The defendant, who claimed ownership under a tax title, sought dismissal of the action on the ground that prior litigation between

the mortgagee and the defendant's predecessor in interest was *res judicata* as to the matters in controversy. However, since the prior action involved different parcels of land, the court held different causes of action were involved and the first suit merely estopped the mortgagee from relitigating matters and material facts distinctly put in issue in the prior case.

CONCLUSION

For the foregoing reasons, the District Court's order dismissing the state's complaint against the United States and its officers should be reversed with the direction that the state's claims be heard and decided on the merits.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,

HAROLD T. HARTINGER,

J. R. PRITCHARD,
Assistant Attorneys General,

Attorneys for Appellant.

December 1967

APPENDIX A

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 2996

STATE OF WASHINGTON, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Interior,
et al., *Defendants*.

ORDER OF DISMISSAL AND
FINAL JUDGMENT

THIS CAUSE came on before the Court at Spokane, Washington on May 19, 1967, the Honorable Charles L. Powell presiding, on motion to dismiss, interposed by the defendants Stewart L. Udall, Secretary of the Department of the Interior of the United States of America; Floyd E. Dominy, Commissioner of the United States Bureau of Reclamation; H. T. Nelson, Regional Director of the United States Bureau of Reclamation; W. E. Rawlings, Columbia Basin Project Manager of the United States Bureau of Reclamation; and the United States of America. The Court, having considered the records and files in this action, Memoranda of Authorities submitted by the respective parties, and having heard arguments of counsel; and the Court having

thereupon rendered oral opinion herein, concluding that the motion of the defendants Stewart L. Udall, and others, should be granted;

The Court having further determined pursuant to Rule 54(b), Federal Rules of Civil Procedure, that there is no just reason for delay and having directed the entry of a final judgment herein as to all defendants excepting only the defendant South Columbia Basin Irrigation District, now therefore,

IT IS HEREBY ORDERED AND ADJUDGED that:

The motion to dismiss the Complaint in this action, interposed by the defendants Stewart L. Udall, Floyd E. Dominy, H. T. Nelson, W. E. Rawlings, and the United States of America, is hereby granted and as to said defendants and each of them the complaint of the plaintiff State of Washington is hereby dismissed.

This Order Granting Dismissal herein as to said defendants is based upon the following reasons and grounds:

1. The Court lacks jurisdiction herein for the reason that the United States of America, an indispensable party to this action, has not consented to be sued or otherwise waived its sovereign immunity from actions of the character stated in the complaint of the State of Washington.

2. The Court lacks jurisdiction herein for the reason that the suit as against the defendants, Udall, Secretary of the Department of the Interior of the United States of America; Floyd E. Dominy,

Commissioner of the United States Bureau of Reclamation; H. T. Nelson, Regional Director of the United States Bureau of Reclamation; W. E. Rawlings, Columbia Basin Project Manager of the United States Bureau of Reclamation, is in essence an action against the United States of America, to which it has not consented.

3. This Court lacks jurisdiction of the subject matter of this action for the reason that application of the Tucker Act (28 USCA 1346(a) (2)) to afford relief to the plaintiff in damages, within the limits of the jurisdiction of this court, and as sought by the complaint of the plaintiff, would in effect permit separate litigation by the plaintiff upon a portion of similarly-situated lands of the plaintiffs within the Columbia Basin Reclamation Project, constituting an impermissible splitting of plaintiff's cause of action.

4. This Court lacks jurisdiction to grant the relief sought by the plaintiff, State of Washington, in its complaint.

A transcript of the oral decision of the Court rendered on May 19, 1967, as prepared and certified by the Court Reporter of this Court, and which sets forth the oral statement by the Court of the reasons and grounds for the granting of motion to dismiss, is attached to this Order and by reference is made a part hereof.

DATED this 7 day of July, 1967.

CHARLES L. POWELL

United States District Judge

* * *

ORAL DECISION OF THE COURT

May 19, 1967

* * *

THE COURT: I appreciate your arguments and the able briefs that have been submitted.

I think probably if I took this matter under advisement I would only come to the conclusion that I feel I must make now. If counsel have no objections I would like to dispose of this matter at this time.

I have considered the dilemma of the State and the Irrigation District, and I recognize the frustration that they have in dealing with the government agencies, surrounded by the immunity which the Government has.

I feel that this is a case where the rule of *Dugan v. Rank* applies. I have some knowledge of that case because I was sitting on the Court of Appeals when the original appeal was heard, when it was *California versus Rank*, as I remember it, and I concurred with Judge Merrill when he held that the Reclamation officials at that time were acting beyond the scope of their authority, and therefore some of the requested relief was granted.

The Court of Appeals decisions was reversed, and the Supreme Court opinion reiterates the rule in the *Larson* case, that no relief will be granted against government officials if the relief calls for an expenditure of moneys from the public treasury or requires action by the Government.

I feel that this is a case which comes within the rule of sovereign immunity, and that the motion to dismiss must be granted.

Now, I feel constrained in making that statement to mention two or three of the arguments that Mr. Hartinger has made. First on the application of the Tucker Act, I feel that this is or would be a splitting of causes of action if we should permit the litigation of every farm unit in a separate lawsuit where the same principle of law is involved in every suit. I think he must go to the Court of Claims for his relief and not attempt to limit the suit to \$10,000 under the Tucker Act.

Under the Administrative Procedures Act, 5 U.S. Code Annotated, 1001 to 1009, and subsequent sections, review procedures are set out. It is a remedial act as in the new mandamus statute, 28 U S C A, 1361. There is no attempt to create in this court special jurisdiction by the passage of these acts. In my opinion this is an action involving contract, and I believe that the Administrative Procedures Act would not apply.

Further, I do feel that there are administrative remedies that have not been pursued, but I am assuming that if they had been we would arrive at the same point where we are now.

The mandamus statute does not say that officials may be mandamused under any circumstances. It only applies, as I understand it, if there is

a refusal by an official to act as provided by statute, where he is required to take some action.

Now, I mention at this time that I feel there is a definite need for some determination of this question. The Irrigation District is between the State and the Government. It is required to make payments to the Government for irrigation water that has not been used, and the State cannot use the water because it cannot sign a recordable contract, and cannot dispose of the property because it cannot sell it except at public auction to the highest bidder. Such a sale is prevented by the Columbia Basin Project Act.

There is a definite need of Congressional legislation, and I feel that is probably the only place where the remedy may lie.

This Court cannot grant the mandatory injunction as requested against the Government officials who are named in this motion.

* * *

APPENDIX B

Public Law 87-728 [H.R. 11164]
76 Stat. 677-79 (1962)

AN ACT

To approve an amendatory repayment contract negotiated with the Quincy Columbia Basin Irrigation District, authorize similar contracts with any of the Columbia Basin Irrigation Districts, and to amend the Columbia Basin Project Act of 1943 (57 Stat. 14), as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the amendatory repayment contract with the Quincy Columbia Basin Irrigation District negotiated by the Secretary of the Interior, pursuant to subsection (a) of section 7 of the Reclamation Project Act of 1939 (53 Stat. 1192; 43 U.S.C. 485f), which contract was approved by the district electors on February 13, 1962, is hereby approved and the Secretary is hereby authorized to execute it on behalf of the United States and to negotiate and execute on behalf of the United States amendatory repayment contracts in substantially the same form or amendatory repayment contracts containing substantially the same provisions with the South and East Columbia Basin Irrigation Districts.

Sec. 2. Upon any amendatory repayment contract with a Columbia Basin Irrigation District ap-

proved or authorized by this Act becoming effective to bind the United States, that district's share of the operation and maintenance funds expended or obligated for the construction of drainage works including appropriate interest thereon during calendar years 1960, 1961, and 1962 shall be capitalized and charged as a part of the construction cost of the project works assigned directly to irrigation and the Secretary shall either refund to it or give it credit for (as it may elect) all operation and maintenance payments (including interest paid by it in connection therewith) which it has made for the construction of drainage works during those years, such credit, if so elected by the district, to be applied against future development period and/or construction charges of the district as they become due.

Sec. 3. The Columbia Basin project shall be governed by the Federal reclamation laws, being the Act of June 17, 1902 (32 Stat. 388), and all Acts amendatory thereof or supplementary thereto, except that sections 2, 3, 7, and 9 of the Columbia Basin Project Act of March 10, 1943 (57 Stat. 14), as amended, are hereby repealed and section 4 of the Columbia Basin Project Act, as amended, is further amended to read as follows:

“Sec. 4. (a) For the purposes of assisting in the permanent settlement of farm families, protecting project land, and facilitating project development, the Secretary is authorized to administer public lands of the United States in the project area and lands acquired under this section; to sell, ex-

change, or lease such lands; to dedicate portions of such lands for public purposes in keeping with sound project development; to acquire in the name of the United States, at prices satisfactory to him, such lands or interests in lands, within or adjacent to the project area, as he deems appropriate for the protection, development, or improvement of the project; and to accept donations of real and personal property for the purposes of this Act. Any moneys realized on account of donations for purposes of this Act shall be covered into the Treasury as trust funds.

“(b) Contracts, exchanges, and leases made under this section shall be on terms that, in the Secretary’s judgment, are in keeping with sound project development. In addition, land sale and exchange contracts shall be on a basis that, in the Secretary’s judgment, provides for the return, in a reasonable period of years, of not less than the appraised value of the land and improvements thereon. Qualification of applicants for the purchase of land for irrigation farming shall be prescribed as provided in subsection (c) of section 4 of the Act of December 5, 1924 (43 Stat. 702), notwithstanding any other provisions of law. No farm unit shall be sold to, and no contract to sell a farm unit shall be entered into with, any person, corporation, or joint-stock association which has theretofore purchased or entered into a contract to purchase a farm unit from the United States on the Columbia Basin project. The foregoing provisions of this paragraph shall apply only to the sale of farm units which are suitable for settle-

ment purposes. Farm units which, in the opinion of the Secretary, are not suitable for settlement purposes may be sold with a preference to resident project landowners as supplemental units, subject to the applicable irrigable acreage limitations on the delivery of water, but the purchasers thereof shall not be entitled to benefits of the Act of August 13, 1953 (67 Stat. 566) with respect thereto."

Sec. 4. The Secretary is hereby authorized and directed to amend or modify all existing contracts, instruments, rules, regulations, forms, and procedures entered into or issued under the Columbia Basin Project Act, as amended (16 U.S.C., chap. 12D) prior to the date of enactment of this Act to conform to the provisions of this Act.

Sec. 5. (a) Notwithstanding the provisions of the Federal reclamation laws, water may be delivered to a farm unit platted before the enactment of this Act that contains a nominal quarter section of land exceeding one hundred and sixty irrigable acres insofar as those provisions limit the delivery of water to irrigable lands in excess of one hundred and sixty irrigable acres.

(b) The rights of any vendee or grantee as defined in section 3 of the Columbia Basin Project Act of 1943 are hereby preserved as to any transactions that were consummated by contract or deed prior to repeal of said section 3 of this Act.

Sec. 6. The following sections of the Columbia Basin Project Act of March 10, 1943, are hereby amended in the following respects:

(a) Section 5(b). Delete the last sentence thereof.

(b) Section 6. Delete "under section 2 hereof" and insert in lieu thereof the words "for the repayment thereof".

(c) Section 8. Delete "and to include in the contracts hereinbefore provided for" and insert in lieu thereof the words "and to include in contracts relating to the Columbia Basin project".

Sec. 7. The Act of June 23, 1959 (73 Stat. 87) is hereby amended to permit delivery of water to not to exceed six hundred and forty acres of irrigable lands whether or not said lands are in conformed farm units, owned by the State of Washington for use by the Washington State University for agricultural research purposes.

Approved October 1, 1962.

APPENDIX C

43 U.S.C. § 423e

§ 423e. *Completion of new projects or new division; execution of contract with district as condition precedent to delivery of water; contents of contract; cooperation of States with United States; limitations on sale of land*

No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located

whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided however*, That if excess land is acquired by foreclosure or other process of law, by conveyance in

satisfaction of mortgages, by inheritance, or by devise, water therefor may be furnished temporarily for a period not exceeding five years from the effective date of such acquisition, delivery of water thereafter ceasing until the transfer thereof to a landowner duly qualified to secure water therefor: *Provided further*, That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment. May 25, 1926, c. 383, § 46, 44 Stat. 649; July 11, 1956, c. 563, § 1, 70 Stat. 524.

APPENDIX D

Public Law 851, 81st Cong., 2d Sess.
64 Stat. 1074 (1950)

AN ACT

To amend the Columbia Basin Project Act with reference to State lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second paragraph of section 7 of the Columbia Basin Project Act (Act of March 10, 1943, ch. 14, 57 Stat. 14) be amended to read as follows:

“Legislation otherwise conforming to the standards above stated in this section will meet the requirements of the section even though, by reason of limitations in the State constitution, the contracts required under subsection 2(c) cannot be executed pursuant to such legislation as to the State’s school and other public lands. As to such lands the provisions and requirements of subsection 2(c) shall remain effective, except that the purchaser of such State lands, his heirs and devisees, if otherwise qualified to execute a recordable contract, shall not be disqualified to execute such contract by reason of the amount of the purchase price paid or to be paid to the State for such lands; but the period in which the required recordable contracts may be executed shall

be extended: (a) as to any of such lands remaining in the ownership of the State, until six months after the removal of the constitutional limitations above referred to; and (b) as to any of such lands which are offered for sale by the State in accordance with such program for the offering of State lands within the project as may be agreed to between the State and the Secretary, until six months after the State's conveyance or contract to convey is made, whichever is earlier."

Approved September 27, 1950.

APPENDIX E

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Columbia Basin Project, Washington

**Agreement Relating to Disposal of State Lands in the
Columbia Basin Project, Washington**

THIS AGREEMENT, made this 12th day of September, 1951, pursuant to the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto, including the Columbia Basin Project Act (57 Stat. 14) as amended by Public Law 851, 81st Congress, and the pertinent portion of Section 2 of the Act of August 30, 1935 (49 Stat. 1028, 1039), collectively referred to as the Federal Reclamation Laws, and Sections 89.12.010 through 89.12.130, inclusive, Revised Code of Washington between THE UNITED STATES OF AMERICA, hereinafter called the United States, acting through the Regional Director, Region 1, Bureau of Reclamation, hereinafter called the Regional Director, and the STATE OF WASHINGTON, hereinafter called the State, acting through the Commissioner of Public Lands, pursuant to Sections 79.12.300 through 79.12.370, inclusive, Revised Code of Washington;

WITNESSETH, THAT:

2. WHEREAS, the Commissioner of Public Lands has jurisdiction over State-owned lands in the Columbia Basin Project, hereinafter called the Project, which he desires to have divided into farm units and to dispose of as hereinafter provided; and

3. WHEREAS, the disposal of State lands should be conducted in accordance with a program mutually agreeable to the State and the Regional Director for and on behalf of the Secretary of the Interior;

NOW THEREFORE, it is agreed as follows:

4. The State will permit the United States to enter upon State lands within the Project, and to make surveys thereof, and to include such lands in farm unit plats.

5. The United States, acting in accordance with the provisions of the Columbia Basin Project Act, will plat State lands within the Project into entire farm units whenever practicable and will furnish the State with a print of all preliminary and final farm unit plats which affect State lands promptly upon completion thereof. During the period of preparation of farm unit plats, the United States will inform the State regarding proposed treatment of State lands and will consult and cooperate with the State concerning problems involving State lands which arise during the platting thereof. The United States will not include more than 160 acres of State lands in any one farm unit.

6. The United States will inform the State in writing concerning the legal descriptions, land classifications and appraised values of farm units or portions thereof laid out in final farm unit plats on State lands, and the estimated dates when water will be available to irrigation blocks containing State lands, and will keep the State informed concerning any changes in the program of the United States which will affect water availability dates. All State lands included in farm units will, so far as possible, be reappraised by the United States in accordance with the basis of valuation established under the Columbia Basin Project Act at least one year and not more than two years prior to the estimated dates when water will become available to the irrigation blocks containing such lands.

7. The State will offer its lands in each irrigation block for sale not more than one year prior to the estimated date when water will become available to the particular irrigation block in which the lands are located; and it will announce at the sale thereof the reappraised values placed upon its lands therein by the United States; and it will require, as a condition to the confirmation of its sales, that purchasers enter into recordable contracts with the United States in the form attached hereto as Exhibit A.

8. All sales by the State of land within the Project which has been platted into farm units by the United States will be by farm units as determined by final farm unit plats, where the entire

area of a unit is owned by the State. Where the State does not own all the land in an established farm unit, its sale will comprise all of the State's land within that farm unit. Not more than one farm unit will be sold to any one purchaser. At the time State farm units or portions thereof are offered for sale, the State will notify the United States of proposed sales, in order to enable the latter to bid if it so desires. Where State lands subject to this agreement are, for some special reason, to be sold prior to the filing of final farm unit plats, a thirty-day notice of such proposed sale will be given the United States.

9. Any notice required or authorized by this agreement shall be deemed properly given, except as otherwise specifically provided in this agreement, if mailed, postage prepaid, to the District Manager, Columbia River District, Ephrata, Washington, on behalf of the United States, and to the Commissioner of Public Lands, State of Washington, Olympia, Washington, on behalf of the State.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom.

11. The parties hereto recognize that the Board of State Land Commissioners has general supervision and control over the sale of lands granted to the State for educational purposes and it is not intended that this agreement shall encroach on the jurisdiction of that Board.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed the day and year first above written.

THE UNITED STATES OF AMERICA
By (sgd.) F. M. Clinton

Acting Regional Director,
Region 1, pursuant to authorization approved by the
Secretary of the Interior
on July 25, 1951

STATE OF WASHINGTON
By (sgd.) Jack Taylor

Commissioner of Public Lands

(SEAL)

9-11-51

Approved as to form :
(sgd) E. P. Donnelly
Assistant Attorney General

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

HAROLD T. HARTINGER
*Assistant Attorney General
Of Attorneys for Appellant*

In the
United States
Court of Appeals
For the Ninth Circuit

No. 22413

STATE OF WASHINGTON, *Appellant*
v.

STEWART L. UDALL, Secretary of the
Interior, *et al.*, *Appellees*

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF FOR APPELLANT

FILED

APR 5 1968

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In the
United States
Court of Appeals
For the Ninth Circuit

No. 22413

STATE OF WASHINGTON, *Appellant*

v.

STEWART L. UDALL, Secretary of the
Interior, *et al.*, *Appellees*

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF FOR APPELLANT

STATEMENT OF THE CASE

In outline form the State of Washington's case in the district court is this:

1. By letter of August 5, 1966 (R. 26), the Columbia Basin Project Manager ruled that state school lands within the Columbia Basin Project were subject to the 160 acre limitation of 43 U.S.C. § 423e.¹ Since the statute refers to "irrigable land held in *private* ownership,"² the state sought judicial

¹App. C, *Brief for the Appellant* 47-49.

²*Id.* at 48.

review of the administrative decision under the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706, and the mandamus statute, 28 U.S.C. § 1361. The defendants for the purpose of this review are the Manager of the Columbia Basin Project and his superiors.

2. If judicial review of the administrative action is not available the state seeks money damages from the United States under the Tucker Act, 28 U.S.C. § 1346(a) (2), for damages to Farm Unit 35.

The state's prayer for a declaratory judgment pertaining to its rights under the 1951 contract (R.17-25) between the United States and the state was abandoned in the trial court and thus is not an issue on appeal.³ Furthermore, the state's alternate claim for monetary damages under the Tucker Act arises under 43 U.S.C. § 423e and not under the 1951 contract.

The fundamental issue in the state's case, whether relief be judicial review of administrative action or an award of damages, is the meaning of the phrase "lands in private ownership"—not whether the district court should review the 1951 contract or award damages for its breach. If the acreage limitation of the federal reclamation law does not apply to city-owned land, and it does not, *El Paso County Water Improvement Dist. v. City of El Paso*, 133 F. Supp. 894, 920 (W.D. Tex. 1955), *mod. on other grounds*, 243 F.2d 927 (5th Cir.),

³See *Brief for the Appellant* 15 n.21.

cert. den., 355 U.S. 820 (1957), certainly the limitation does not apply to state school lands. These lands were granted by Congress *in trust* to implement a long-standing federal policy of support for common schools. *Lassen v. Arizona Highway Dep't*, 385 U.S. 458 (1967).

REPLY TO APPELLEES' ARGUMENT

Jurisdiction Under the Administrative Procedure Act

I

The government in this case makes no arguments that were not made by it⁴ and rejected by this court in *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), *reh. denied*, 379 F.2d 555 (1967), *cert. granted on other issues*, 389 U.S. 970 (1968). Almost without exception the decisions in this circuit uphold the district court's jurisdiction to review administrative action under the Administrative Procedure Act even though the administrative action involves property of the United States.

⁴There was no challenge to the venue in the court below by reason of the joinder of the defendant officers of the United States in a judicial district other than that of their official residence, nor could there be. Under 28 U.S.C. § 1391(e) civil actions against officers of the United States may be brought in the judicial district (1) where the officer resides, (2) where the cause of action arose, or (3) where the real property involved in the action is situated. The government's present suggestion of improper venue, *Brief for the United States* 19-22, merits no extended discussion even if it had been timely raised.

To the long list of cases already cited in our *Brief for the Appellant* 20-27, we can add *Linn Land Co. v. Udall*, 255 F. Supp. 382 (D. Ore. 1966), *aff'd*, 385 F.2d 91 (9th Cir. 1967); *Nicholas v. Secretary of the Dep't of Interior*, 385 F.2d 177 (9th Cir. 1967); *Henault Mining Co. v. Udall*, 271 F. Supp. 474 (D. Mont. 1967); *Henrickson v. Udall*, 229 F. Supp. 510 (N.D. Calif. 1964), *aff'd*, 350 F.2d 949 (9th Cir. 1965).

Linn Land Co. involved a selection of public lands in satisfaction of certain scrip rights. *Nicholas* involved an entryman's final proof on a homestead entry. *Henault Mining Co.* was a mining claimant's successful suit for a reversal of the Secretary of Interior's decision that mining claims were invalidated for lack of discovery. *Henrickson* concerned an application for a patent of government land under a mining claim.

Since the Supreme Court's approval of *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959), in *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 n.7 (1963), there can be no question but that the jurisdiction granted district courts under the Administrative Procedure Act is not limited by the fact that the administrative action being reviewed involved property of the United States.⁵ The holding of the Court is fully warranted by the legislative history of the act. *Administrative Procedure Act—Legislative History*, S. Doc. No. 248, 79th Cong.,

⁵See our *Brief for the Appellant* 21.

2d Sess. (1946) (hereafter cited as *APA Legislative History*).⁶

II

If the state's suit were one based on the 1951 contract between it and the United States—rather than one arising under 43 U.S.C. § 423e—the Administrative Procedure Act should not be construed as a grant of jurisdiction to district courts to give money damages in excess of their Tucker Act jurisdiction, *Aktiebolaget Bofors v. United States*, 194 F.2d 145 (D.C. Cir. 1951), or to give specific relief where money damages under the Tucker Act constitute an adequate remedy at law, *White v. Administrator of Gen. Servs. Administration*, 343 F.2d 444 (9th Cir. 1965); cf. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Likewise, if the state's case were a quasi-contractual claim for relief against an alleged appropriation of property to governmental use, the Administrative Procedure

⁶In our *Brief for the Appellant* 27 we cited a decision from the Tenth Circuit fully supporting this court's views as to the scope of a district court's jurisdiction under the Administrative Procedure Act. We now have the citation to the reported decision: *Brennan v. Udall*, 379 F.2d 803 (10th Cir. 1967). Our quotation is taken from page 805 of the reported decision.

Earlier the Tenth Circuit had approved a district court's jurisdiction in an action to compel the Secretary of Interior and his subordinates to recognize the state's title to the fee underlying the Union Pacific's federal right-of-way grant through a school section. *Wyoming v. Udall*, 379 F.2d 635 (10th Cir. 1967). The district court had taken jurisdiction under the Administrative Procedure Act. 255 F. Supp. 481 (D. Wyo. 1966). The court of appeals affirmed the district court's jurisdiction, but on the basis of the mandamus statute, 28 U.S.C. § 1361.

Act will not be construed to expand a district court's Tucker Act jurisdiction to award relief other than damages. *E.g.*, *Dugan v. Rank*, 372 U.S. 609 (1963); *Fresno v. California*, 372 U.S. 627 (1963); *Malone v. Bowdoin*, 369 U.S. 643 (1962). Legislative history of the Administrative Procedure Act gives some support to the view that money damages in such cases were deemed an adequate remedy at law, making the provisions of the act inapplicable by its own terms. See, *e.g.*, *APA Legislative History* 36.

It goes without saying, as this court recognized in *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), *reh. denied*, 379 F.2d 555 (1967), that officers of the United States must be named as defendants in a suit such as the state's instant action. A proper action under the Administrative Procedure Act against federal officers will fail where they are not joined as defendants and, instead, only the United States is sued. *E.g.*, *Chournos v. United States*, 335 F.2d 918 (10th Cir. 1964). Finally, it also goes without saying that the state could not maintain this present suit if there were a statute expressly withdrawing judicial review of the administrative action to which complaint is directed. This principle is illustrated by the cases construing 38 U.S.C. § 11a-2, prohibiting judicial review of a denial of benefits under the Servicemen's Indemnity Act of 1951, *e.g.*, *Cyrus v. United States*, 226 F.2d 416 (1st Cir. 1955); *United States v. Houston*, 216

F.2d 440 (6th Cir. 1954); *Brewer v. United States*, 117 F. Supp. 842 (E.D. Tenn. 1954).

**Jurisdiction Under the Mandamus
Statute, 28 U.S.C. § 1361**

I

The legislative history of the mandamus statute, 28 U.S.C. § 1361, establishes beyond all doubt the jurisdiction of all federal district courts to review and compel official action on an equality with the federal district court in the District of Columbia.⁷ Consequently, as pointed out by Messrs. Byse and Fiocca in *Mandamus and Venue Act*, note 7 *supra*, at 318:

The initial resort of a federal judge reviewing official action under section 1361, therefore, should be to the body of precedents built up in the District Court and the United States Court of Appeals for the District of Columbia. Looking to those opinions he will find that those courts are in many cases categorizing actions that request affirmative relief not as 'mandamus' cases but as 'reinstatement' cases, 'land patent' cases and so on, classifications that focus on the substantive issues involved rather than the writ. *Most importantly, these District of Columbia courts have for the most part avoided reliance on the much criticized ministerial-discretionary distinction. (Emphasis ours.)*

⁷See, C. Byse & J. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962*, 81 Harv. L. Rev. 308, 313-18 (1967) (hereafter cited as Byse & Fiocca, *Mandamus and Venue Act*).

On this basis these commentators conclude, *ibid.*:

Since section 1361 was proposed and enacted against the background of mandamus relief as it existed in the District of Columbia in the year 1962, it would be most unfortunate if federal courts were to regard the words 'in the nature of mandamus' as an invitation to revive the artificialities of common law mandamus.

It is true, as the government here points out,⁸ that the Department of Justice initially proposed that the statute be specifically limited to "ministerial duties owed the plaintiff."⁹ However, before final passage of the measure such special limitation was deleted and the Justice Department acquiesced in the deletion.¹⁰ Byse & Fiocca, *Mandamus and Venue Act*, at 317.

II

Scope of judicial review in a District of Columbia "action in the nature of mandamus" does not turn on a ministerial-discretionary distinction. See, *e.g.*, *Udall v. Tallman*, 380 U.S. 1 (1965). Jurisdiction is much broader based than that. *Wyoming v. Udall*, 379 F.2d 635 (10th Cir. 1967), illustrates this point in a context that has particular application to this action.

In the *Wyoming* case, controversy had arisen over the ownership of oil and gas deposits underlying

⁸Brief for the United States 26.

⁹Letter of the Deputy Attorney General, Feb. 28, 1962, S. Rep. No. 1922, 87th Cong., 2d Sess. (1962) (*U.S. Code Cong. & Ad. News*, at 2788).

¹⁰Letter of the Deputy Attorney General, Sept. 18, 1962, 108 Cong. Record 20079.

a railroad right-of-way across a school section in Wyoming. The United States in 1877 and in 1844 made the railroad grant to the predecessor of the Union Pacific Railroad Company. Later, under the Wyoming Enabling Act, title to a school section crossed by the right-of-way vested in the state. When the Secretary of the Interior upheld the claim of the United States to the land under the right-of-way the state and its lessee brought a mandamus action under section 1361 to compel recognition of Wyoming's title.

In view of the considerations pointed out in our *Brief for Appellant* 27-29, there can be no doubt that the Tenth Circuit decision was a proper one (even apart from the jurisdiction under the Administrative Procedure Act relied upon by the district court, 255 F. Supp. 481 (D. Wyo. 1966)).

Of course the mandamus statute is not to be construed so as to give district courts general jurisdiction to make monetary awards that would be beyond the jurisdiction of district courts in the District of Columbia, *Rose v. McNamara*, 225 F. Supp. 891 (E.D. Pa. 1964), or to change the rule already applicable to Administrative Procedure Act cases that money damages is the sole recourse of a plaintiff injured by the government's breach of its contract, *White v. Administrator of Gen. Servs. Administration*, 343 F.2d 444 (9th Cir. 1965), or to expand the scope of judicial review in those cases where it already existed, as in civil service reinstatement.

ment cases,¹¹ *McEachern v. United States*, 212 F. Supp. 706 (W.D.S.C. 1963).

Damages Under the Tucker Act

The government correctly points out that the only Tucker Act issue before the court is whether the state has split its cause of action. The question, consequently, is whether the authorities cited by the state to show the existence of *separate* causes of action, *Brief for the Appellant* 31-35—rather than a splitting of *one* cause of action—should be distinguished.

The government has made no attempt to distinguish the cases; we see no reasonable grounds for doing so. Clearly, therefore, the state cannot be charged with splitting its cause of action for damages to Farm Unit 35.

¹¹E.g., *Mancilla v. United States*, 382 F.2d 269 (9th Cir. 1967). See, generally, M. Eisenberg, *The Influence of the Writ of Mandamus in Federal Personnel Litigation*, 45 Geo. L. J. 388 (1957); C. Murphy, *Judicial Review of the Removal of Federal Employees: A Reexamination*, 22 Fed. B. J. 25 (1962); Note, *Review of Removal of Federal Civil Service Employees*, 52 Colum. L. Rev. 787 (1952); Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 Colum. L. Rev. 719 (1966).

CONCLUSION

For the foregoing reasons and for the reasons set out in the *Brief for the Appellant*, the district court's order dismissing the state's complaint should be reversed and the cause remanded with the direction that the state's claim be heard and decided on the merits.

Respectfully submitted,

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March 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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**In the United States Court of Appeals
for the Ninth Circuit**

STATE OF WASHINGTON, APPELLANT

v.

**STEWART L. UDALL, Secretary of the Interior, ET AL.,
APPELLEES**

**Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division**

**BRIEF FOR THE UNITED STATES AND ITS OFFICERS,
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No. 22413

STATE OF WASHINGTON, APPELLANT

v.

STEWART L. UDALL, Secretary of the Interior, ET AL.,
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**Appeal from the United States District Court
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**BRIEF FOR THE UNITED STATES AND ITS OFFICERS,
APPELLEES**

OPINION BELOW

The unreported oral opinion of the district court is attached to its judgment (R. 152-155).

JURISDICTION

The complaint stated (R. 2):

The plaintiff seeks a declaratory judgment, injunctive relief, and relief of the nature of man-

damus under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1964); the Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964); and 28 U.S.C. §§ 1331 and 1361 (1964). The plaintiff seeks a judgment for damages against the United States under 28 U.S.C. § 1346 (1964).

Appellees moved to dismiss (R. 35-36), which was granted, and judgment of dismissal was entered on July 7, 1967, as to all federal defendants, pursuant to Rule 54(b), F.R.Civ.P. (R. 149-151). Notice of appeal was filed on August 30, 1967 (R. 159-160). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the United States has consented to suit for a declaratory judgment establishing the right of the State of Washington to secure water from a federal project free of specified restrictions and
2. Whether such a suit will lie to enjoin federal officers from enforcing such limitation and compelling them by relief in the nature of mandamus to deliver water as demanded by the State and
3. Whether the United States has consented to suit in the United States District Court for the Eastern District of Washington for damages as sought by the plaintiff.

STATUTES INVOLVED

28 U.S.C. sec. 1346 provides:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * *

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. sec. 1361 provides:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. sec. 2201 provides:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

5 U.S.C. sec. 703 (formerly part of Section 10 of the Administrative Procedure Act) provides:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

STATEMENT

Since this case was dismissed on motion, the facts are those as alleged in the complaint, together with federal legislation. In brief, the allegations are that the State owns some 14 tracts of school lands, containing a total of 1,594 irrigable acres, located within the South Columbia Basin Irrigation District (R. 3-4; Ex. A, B, R. 13, 14). The United States owns and operates the irrigation system within the District (R. 4).

The Columbia Basin Project was undertaken pursuant to the Columbia Basin Project Act, 16 U.S.C. sec. 835, for reclamation features of Grand Coulee Dam. The policy of the reclamation law has been to confine the benefits of irrigation to no more than 160 acres of land in a single ownership. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958). This

is expressed in Section 46 of the Omnibus Adjustment Act of May 25, 1926, 44 Stat. 629, as amended, 43 U.S.C. sec. 423(e) (*Id.*, pp. 292, 297). This policy was applied to the Columbia Basin Project by process of dividing the benefited area into irrigation blocks and establishing farm units of no more than 160 acres within the blocks. As a condition to receipt of water, landowners were required to execute recordable contracts to sell their excess land—i.e., that which exceeded the maximum acreage from the farm unit—at an appraised value which would exclude enhancement due to the project. 16 U.S.C. sec. 835a. By amendment of 1950, special provision was made, stating, in effect, that purchasers from the State should not be disqualified from executing recordable contracts because of the price paid to the State as a result of a program agreed to between the State and the Secretary for offering state lands. 16 U.S.C. sec. 835c-3. Attached to the complaint as Exhibit D is a contract dated September 12, 1951, between the State and the United States which provided *inter alia*, that purchasers would enter into recordable contracts, with the United States, enforcing the excess land law (Exhibit D to complaint, R. 17-25). The special 1950 provision was repealed by the Act of October 1, 1962, 76 Stat. 678.

Federal officers, the complaint alleged, thereafter expressed an intention to refuse to acknowledge continuing obligation of the 1951 contract, to deliver water to state school lands and to execute recordable contracts with purchasers (R. 5-6). Allegedly for the purpose of resolving questions, the State paid assess-

ments for two farm units, designated portions thereof as its non-excess land and demanded delivery of water to the portion not designated as non-excess land (R. 7). This demand was refused absent execution of a recordable contract (R. 7).

The State alleged that it was powerless to execute a contract, that it refused to do so for various reasons, and that the refusal of federal officers was unlawful, arbitrary and capricious, and stated (R. 8):

The defendant officers' refusal to deliver water as demanded has damaged the State of Washington in the sum of \$5,000. The defendant officers' refusal to deliver water in the future threatens damages to the State of Washington in a sum in excess of \$10,000.

The relief sought was various declarations of law; injunctions against requiring recordable contracts as to any state school lands and against refusing to execute contracts with the purchasers of such lands; an order in the nature of mandamus to compel delivery of water as demanded by the State and judgment for \$5,000 (R. 10). Alternatively, it asked for a judgment declaring the rights under the 1951 contract and \$1,000 (R. 11).¹

The United States and its officers moved to dismiss on several grounds (R. 35-36). After briefing and argument, the district court entered final judgment of dismissal under Rule 54(b) on the grounds, elaborated on in its oral opinion attached to the judgment,

¹ In a second alternative prayer, relief was asked against the South Columbia Irrigation District.

that the United States had not consented to be sued; that the attempted suit against the federal officers was, in essence, an action against the United States; and that the Tucker Act claim was an "impermissible splitting of plaintiff's cause of action" (R. 149-150).

ARGUMENT

I

The United States Has Not Consented to This Suit

A. *The United States has not consented to the award of specific relief against it.*—In *City of Fresno v. California*, 372 U.S. 627 (1963), a claim was made by the City of a right to receive water from a reclamation project at certain prices. The Supreme Court affirmed this Court's holding that the United States had not consented to that suit. The property involved in the present case is irrigation water produced by the federal reclamation project. In essence, the State in this action seeks by specific relief to secure the rights it claims to such waters free of the excess land law requirements. But the United States has not consented to a suit seeking a court order directing conveyance of federal property to the plaintiff. This Court so declared in *White v. Administrator of General Services Admin. of U. S.*, 343 F.2d 444 (1965), when it said (pp. 445-446):

The object of the appellants in the instant suit is to get the title out of the United States and into the appellants. A suit with such an objective is a suit for specific performance, regardless of what may be said in the complaint which initiates the suit. And, the title to the interest which

the court is asked to order to be conveyed to the appellants being now in the United States, the order would have to be made against the United States. It follows that the United States would have to be a party to the suit.

If the fact that the United States is not named as a party in the suit could be overlooked and, though not named, it were treated as the real party in interest, which it is, the suit would still have to be dismissed, because the United States has not consented to be judicially compelled to perform its contracts. From the beginning of its history, the United States asserted and maintained complete immunity from suit until Congress, by the Act of February 24, 1855, 10 Stat. 612, created the United States Court of Claims and gave consent for the United States to be sued for compensation for certain breaches of duty, one of which was breach of contract. The Act of March 3, 1887, 24 Stat. 505, 28 U.S.C. § 1346, conferred a partly parallel jurisdiction upon the United States District Courts. Those statutes have never been regarded as having given consent that the United States could be ordered by a court to specifically perform a contract.

After referring to several decisions concerning sovereign immunity, including *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949), it continued (p. 446):

* * * In our case, if the appellants are given the relief which they seek, the appellees will have to sign the name of the United States of America to a deed conveying an interest in land. No one can do that as an individual. When considered in relation to the *Larson* opinion, the instant case is an *a fortiori* case.

Even the dissenting Justices in *Larson* would have decided the instant case as we decide it.

* * *

In *United States v. Sherwood*, 312 U.S. 584 (1941), the Court said (p. 588) that the jurisdiction of the Court of Claims "is confined to the rendition of money judgments in suits brought for that relief against the United States" and (p. 591) that the Tucker Act jurisdiction to adjudicate claims against the United States "does not extend to any suit which could not be maintained in the Court of Claims." It can make no difference that the property sought to be obtained is the right to water from a reclamation project, rather than, as in *White*, title to a particular tract of land.

B. *The Declaratory Judgment Act, 28 U.S.C. sec. 2201, is not a consent to sue the United States.*—In *White, supra*, this Court so held, saying (p. 447): "We find nothing in the statutes relating to declaratory judgments or administrative procedure which is helpful to the appellants." Earlier, this Court in *Brownell v. Ketchum Wire & Mfg. Co.*, 211 F.2d 121 (C.A. 9, 1954), held (p. 128): "It is true that the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, is not a consent of the United States to be sued, and merely grants an additional remedy in cases where jurisdiction already exists in the court." Accord *Anderson v. United States*, 229 F.2d 675, 677 (C.A. 5, 1956). Plainly, the immunity of the United States from judgments for specific relief cannot be avoided by the simple expedient of asking for a declaration that the State has a contractual right to receive water

from the federal project without condition and free of restrictions. Cf. *City of Fresno, supra*, where the City asked for a declaration as to its entitlement to project water.

C. *The Administrative Procedure Act, now 5 U.S.C. sec. 701, is not a consent of the United States to suit.*—This Court in the quotation in *White, supra*, disposed of the Administrative Procedure Act (here for brevity “A.P.A.”) as a ground for jurisdiction. *City of Fresno, supra*, is squarely in point on the facts of this case. While the A.P.A. is not mentioned in that opinion, it is not to be supposed that the courts and counsel in *Fresno* and the companion case of *Dugan v. Rank*, 372 U.S. 609 (1963), overlooked a clear basis for jurisdiction in those cases. One basic reason the Administrative Procedure Act cannot be read as a consent to the award of specific relief is the one given in *White* for rejecting appellants’ reliance there on the 1962 mandamus statute. This Court there said (p. 447) :

To find in § 1361 such a revolutionary step on the part of Congress as the overturning of what had been settled law since the foundation of the Government, i.e., that the courts do not have jurisdiction to order the Government to specifically perform its contracts, would be to make too much of a short and simple piece of legislation.

There is nothing in the language or the history of the Administrative Procedure Act to justify the suggested waiver of immunity. Besides *White, Chournos v. United States*, 335 F.2d 918, 919 (C.A. 10, 1964), is squarely in point. The court there declared :

The Administrative Procedure Act, 5 U.S.C. § 1001 et seq., does not purport to give consent to suits against the United States. The Act provides that the person suffering legal wrong because of any agency action, or who is adversely affected or aggravated by such action, shall be entitled to judicial review. This review may be obtained only by an appropriate action in "any court of competent jurisdiction." Such an action may not be maintained if the court lacks jurisdiction upon any ground. [Footnotes deleted.]

The Eighth Circuit has recently concurred. *Twin Cities Chippewa Tribal C. v. Minnesota Chippewa Tribe*, 370 F.2d 529 (1967). It dismissed a suit against an Indian tribal corporation and the Secretary of the Interior for lack of jurisdiction, saying (p. 532):

Secondly, plaintiffs assert that the District Court has jurisdiction over the Secretary of the United States Department of the Interior by virtue of § 10 of the Administrative Procedure Act, 5 U.S.C.A. § 1009, 5 F.C.A. § 1009. The alleged "agency action" is assertedly found in 25 U.S.C.A. § 476, 25 F.C.A. § 476, which provides in part as follows: "Amendments to the constitution and bylaws *may* be ratified and approved by the Secretary * * *." (Emphasis supplied.) This reliance on § 10 of the Administrative Procedure Act to establish jurisdiction below is misplaced. Section 10 of the Act does not confer jurisdiction upon the federal courts. Its purpose is to define the procedures and manner of judicial review of agency action rather than confer jurisdiction. *Ove Gustavsson Contr. Co. v. Floete*, 278 F.2d 912, 914 (2nd Cir. 1960); *Barnes v. United*

States, *supra*. Additionally, § 10 does not in itself amount to congressional consent to a suit against defendants, whose right to assert the defense of sovereign immunity is discussed above. *Chournos v. United States*, 335 F.2d 918 (10th Cir. 1964).

Accord *Cyrus v. United States*, 226 F.2d 416, 417 (C.A. 1, 1955); *Aktiebolaget Bofors v. United States*, 194 F.2d 145, 149 (C.A. D.C. 1951).

As these cases show, the A.P.A. does not purport to grant federal courts jurisdiction over any case, nor to consent to suit against the United States in any form. Instead, it refers to "any applicable form of legal action * * * in a court of competent jurisdiction." 5 U.S.C. sec. 703. The attempted invocation of the A.P.A. to justify the present suit against the United States highlights the error of the dictum of a few cases that the Act is a waiver of sovereign immunity or consent of the United States to suit. While apparently a difference merely of phrasing, the distinction between those two expressions is important. So far as we can recall, Congress has never merely waived the sovereign immunity from suit and thus, for example, permitted a suit against its officers, which would otherwise constitute a suit against the United States, to continue. Waivers of immunity have been intentional, specific and partial only and are accomplished by statutes consenting to suit which designate the terms upon which and the manner in which relief can be obtained against the United States. The restrictions upon consent limit the jurisdiction of the courts and cannot be waived, e.g., *Dugan v.*

Rank, supra; *Munro v. United States*, 303 U.S. 36 (1938); *Soriano v. United States*, 352 U.S. 270, 273-274 (1957); *Edwards v. United States*, 163 F.2d 268 (C.A. 9, 1947). *United States v. Sherwood*, 312 U.S. 584 (1941), held that nothing in the Federal Rules of Civil Procedure constituted a consent to sue the United States, emphasizing the rule that "the terms of its [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit" (p. 586) and that the "consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted" (p. 590).

The cases cited by appellant do not justify its position here. Primarily, it relies on *Coleman v. United States*, 363 F.2d 190 (C.A. 9, 1966), aff'd on reh., 379 F.2d 555 (1967). Certiorari was granted in that case (389 U.S. 970) and it now awaits argument. In any event, it was a suit brought by the United States and, on rehearing in this Court, the Secretary of the Interior was joined as a party so that the language as to the effect of the A.P.A. was pure dictum. *Adams v. Witmer*, 271 F.2d 29 (C.A. 9, 1958), reh. den., 271 F.2d 37 (1959), likewise did not involve the United States as defendant. Nor did the other cases cited by appellant (Br. 21-27). As to the merits of the dicta of these cases, they suggest neither statutory language nor reasoning justifying a conclusion that the A.P.A. is a consent to sue the United States. *Adams v. Witmer* does not even say that it is. Nor does *Coleman*. Since the United States had been plaintiff, *Coleman* did not involve and did not discuss any issue of court jurisdiction. *Mulry v. Driver*, 366 F.2d

544 (C.A. 9, 1966), was brought against the United States but found "the necessary consent of the United States" under the A.P.A. (p. 547). It made no attempt to explain why Congress should be deemed to have reached the result (which is, so far as we know, completely novel in the law) of "consenting" to a suit to which the United States would not be a party. The opinion actually does not discuss court jurisdiction but rather scope of review of administrative decision. And all of the discussion is dictum, since the court agreed that the action of the district court in dismissing the action was right.² None of the other cases supports the attempt here to sue the United States, except possibly *Estrada v. Ahrens*, 296 F.2d 690 (C.A. 5, 1961). That case represented the belief of the Fifth Circuit (296 F.2d at p. 698) that "The doctrine [of sovereign immunity] is wearing thin. Recent years have witnessed a great expansion of the individual's rights to seek redress against the government for wrongs committed by it." About a year earlier, the same Circuit had rejected the defense of sovereign immunity in *Bowdoin v. Malone*, 284 F.2d 95 (C.A. 5, 1960), which the Supreme Court reversed, *Malone v. Bowdoin*, 369 U.S. 643 (1962). The *Estrada* reasoning is thus, we submit, based on a wrong premise and is not persuasive.

The consequence of acceptance of the State's argument demonstrates its invalidity. It would mean that unfavorable positions relating to government con-

² Since this was the action taken, further review on any issue of effect of the A.P.A. was not available.

tracts could be reviewed in any court at the plaintiff's choosing by the simple expedient of attaching the label "judicial review" of the federal agents' disagreement with the plaintiff's views as to his rights. Since the A.P.A. is not limited to cases where the issue is contract rights, the same conclusion would follow as to all agency rejections of claims based on statute, contesting regulations, or challenging almost any governmental action. The 1962 mandamus statute, discussed, *infra*, and almost all statutes for review of federal agency decisions would become surplusage and useless acts by Congress under that view. Practically every case sustaining sovereign immunity since adoption of the A.P.A. in 1946 would be wrong. This Court's refusal in *White, supra*, to read the A.P.A. to constitute such a "revolutionary step on the part of Congress" (343 F.2d at p. 447) should be followed here.

D. *The consent to sue the United States in this case cannot be found in the Tucker Act.*—Appellant now relies on 28 U.S.C. sec. 1346, commonly called the Tucker Act, to justify jurisdiction of this case as an independent ground of jurisdiction. In the trial court, it vacillated on this question. The complaint alleged (R. 2):

The matter in controversy upon which the plaintiff seeks a declaratory judgment, injunctive relief, and relief in the nature of mandamus exceeds the sum or value of \$10,000, exclusive of interest and costs. The plaintiff's claim for damages against the United States does not exceed \$10,000 in amount.

As noted (*supra*), the complaint claimed \$5,000 damages for the refusal to deliver water but alleged prospective damages from such refusal in excess of \$10,000 (R. 8) and an alternative that if the excess land provisions are held to be applicable to that portion of Farm Tracts 34 and 35 not designated non-excess, then the State has been damaged \$1,000 (R. 9). The relief sought included damages of \$5,000 and alternatively \$1,000 (R. 10-11).

In its memorandum in opposition to the motion to dismiss, the State said (R. 68): "In both instances the state seeks damages under the Tucker Act, 28 U.S.C. § 1346(a)(2), as supplemental relief" and that "If the state secures relief from the administrative determination * * * this court has jurisdiction under the Tucker Act" (R. 78) and stated (p. 79):

However, this claim to damages is merely supplemental to the main relief sought. If the main relief cannot be granted because of the doctrine of sovereign immunity, the state's damages would exceed the \$10,000 jurisdictional limitation of this court. In that event the state would decline to waive the excess²⁷ and would pursue its cause of action in the court of claims. But until this latter event occurs, this court's jurisdiction over the United States as a named defendant cannot be questioned.

²⁷ As it may do to preserve this court's jurisdiction, *United States v. Johnson*, 153 F.2d 846 (9th Cir. 1946).

Because of these acknowledgments, the United States "put to the side, for the purpose of this Reply,

the State's claims against the United States for money damages" (R. 98).³ In a supplemental memorandum, the State said it wished to modify its position on this subject (R. 119). It now said (p. 120):

The state has now reconsidered the matter. Whether the main relief is granted to it or not, the state stipulates that it waives all claims for damages to Farm Unit 35, Irrigation Block 23, in excess of the court's jurisdictional limits. This stipulation is made to preserve the court's jurisdiction within the rule announced in *United States v. Johnson*, 153 F.2d 846 (9th Cir. 1946).

The district court held that it would be splitting of causes of action to permit litigation of every farm unit as a separate lawsuit (R. 154). In support of rehearing, the State contended that it does not have a present claim for damages to school lands other than Farm Unit 35 because it has not yet paid assessments and, until such payments, it is not entitled to delivery of water (R. 139-140). It further argued that claims for separate parcels were separate causes of action (R. 139-144). The argument is copied in the State's brief here (pp. 30-35).

The law is clear that a claimant against the United States may not split his cause of action so as to avoid the limitations of the Tucker Act. *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849 (C.A. 1, 1947). Plainly, the State cannot achieve the same result here by its own act in withholding pay-

³ The United States' opening brief had made the point that the State was claiming more than \$10,000 past and future damages, beyond the Tucker Act limit (R. 51-52).

ment of assessments on other parcels and thus, in its view, precluding the maturing of a cause of action as to those parcels.

The basic principle applicable here was declared on *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 321 (1927) :

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong.

The principle is demonstrated in *Evans v. Durango Land & Coal Co.*, 80 Fed. 433, 437 (C.A. 8, 1897), where the court stated:

It is doubtless true that so much of the plaintiff's claim as is founded upon trespasses committed prior to December 31, 1894, is subject to certain defenses, which cannot be as well made against the claim for trespasses committed subsequent to that date; but the fact that different defenses may be pleaded to parts of an entire claim does not establish that the claim itself is made up of different and independent causes of action.

Here the right asserted is to receive water from the project and, more important, to sell state lands free of the 160-acre restrictions. The legal wrong alleged is the refusal to recognize that right. The refusal to deliver water, the refusal to permit the State sales it desires, and the refusal to offer the

purchasers recordable contracts are all different consequences of that alleged wrong. The State has very clearly refused to reduce its claim to all damages, present or future, arising from the alleged wrong below \$10,000. The fact that, in other situations, separate parcels of land may constitute separate causes of action, as illustrated by appellant's citations (Br. 31-35), does not alter the fact that this case involves a single alleged right and a single wrong.⁴ That result is even clearer if the case is considered to involve simply repudiation of the contract of 1951.

II

This Suit Will Not Lie Against the Federal Appellees

A. *Except for the 1962 mandamus statute, the district court had no jurisdiction over the Secretary of the Interior and the Acting Commissioner of Reclamation.*—In *Ernst v. Secretary of the Interior*, 244 F.2d 344 (C.A. 9, 1957), this Court, in summarily affirming, held that the Secretary of the Interior and the Solicitor of that Department could not be sued outside the District of Columbia, saying (pp. 345-346):

⁴ The discussion in *United States v. Pan-American Petroleum Co.*, 55 F.2d 753 (C.A. 9, 1932), cert. den., 287 U.S. 612, emphasizes the fact that cause of action includes "the plaintiff's primary right which has been invaded, and the wrongful act or default—the delict—of the defendant by which the right is broken" (p. 776). That case also illustrates the fact that, depending on circumstances, splitting a cause of action may not be fatal, as it is here because of the Tucker Act restriction on the consent to sue the United States.

The order to quash and dismiss the case as against the Secretary and the Solicitor was clearly correct inasmuch as the court lacked jurisdiction of those officers. Their official residence is in Washington, D. C. The governing statute (28 U.S.C.A. § 1391(b) provides that "a civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." There is no statutory authority for instituting suit against these officials elsewhere than in their place of residence.

This was applying well-settled law. *Martinez v. Seat-on*, 285 F.2d 587 (C.A. 10, 1961). In *Ernst*, the district court said (see record of *Ernst*):

The Secretary of the Interior and the Solicitor of the Department of the Interior have appeared specially by the United States Attorney and moved the court for an order quashing the return of service of summons and dismissing the complaint, upon the grounds that these Government officials are residents of the District of Columbia and such action can be brought against them only in the district of their official residence.

Jurisdiction to review such decision could only be conferred by the provisions of Sec. 10 of the Administrative Procedure Act, Title 5, Sec. 1009, U.S.C., upon which plaintiff relies. This statute provides for judicial review of "agency action" of any administrative authority or agency of the United States, which proceeding, in the absence of any specific statute, may be brought "in any court of competent jurisdiction". It is well settled that

any action under the provisions of this Act against a public official of the United States in his official capacity can only be maintained at the official residence of such official, within the meaning of Title 28, Sec. 1391, U.S.C.A. *Blackmar vs. Guerre*, 342 U.S. 512, 516; *Trueman Fertilizer Co. vs. Larson*, (CCA 5), 196 F.2d 910; *Nesbitt Fruit Products Inc., vs. Wallace*, 17 F. Supp. 141; *Torres vs. McGranery*, 111 F.Supp. 241; *Muerer vs. Ryder*, 137 F.Supp. 362; *Clement Martin vs. Dick Corp.*, 97 F.Supp. 961.

Compare *Wilson vs. United States Civil Service Commission*, 136 F.Supp. 104, and *Kansas City Power and Light Co. vs. McKay*, 225 F.2d 924, where actions to review agency decisions were properly in the U.S. District Court for the District of Columbia. In the *Kansas City Power* case the court expressly holds that the Administrative Procedure Act does not of itself establish the jurisdiction of the Federal Courts over an action not otherwise cognizable by them, or does not render competent a court which lacks jurisdiction upon any other ground (p. 933).

As the official residence of the Secretary of the Interior and the Solicitor of the Department of the Interior was and is in the District of Columbia this action cannot be maintained against them in this District. See cases above cite, and *Anno. Title 28, Sec. 1391, U.S.C.A., note 49*.

The Supreme Court, in *Blackmar v. Guerre*, 342 U.S. 512, 515-516 (1952), stated:

It is further suggested that judicial review is authorized by the Administrative Procedure Act, 5 U.S.C. & 1001 *et seq.* Certainly there is no specific authorization in that Act for suit against the Commission [the Civil Service Commission]

as an entity. Still less is the Act to be deemed an implied waiver of all governmental immunity from suit. If the Commission's action is reviewable under § 1009, it is reviewable only in a court of "competent jurisdiction." [Footnotes deleted.]

Under these authorities, the district court lacked jurisdiction over the Secretary of the Interior and the Acting Commissioner of Reclamation, both of whom had their "principal place of business," as the complaint put it (R. 2-3), in Washington, D. C.

B. *The 1962 mandamus statute did not vest the district court with jurisdiction over the Secretary and the Acting Commissioner.*—Historically, there has always been a distinction between mandamus and specific performance. Since Section 1361 deals with mandamus, it cannot be read to mean the entirely different remedy of specific performance. "Federal Courts are courts of limited jurisdiction, having only such jurisdiction as is expressly conferred by statute." *Rambo v. United States*, 145 F.2d 670, 671 (C.A. 5, 1944), cert. den., 324 U.S. 848. The difference between mandamus and specific performance is clearly stated in 34 Am. Jur. 814, Section 9:

Although mandamus has been compared to a bill for specific performance, the two remedies are quite different, both in respect to the jurisdiction to issue them and the relief which they afford. Specific performance is an equitable remedy designed to compel parties to contracts to perform them according to their terms, while mandamus is a legal remedy having for its purpose the compulsion of legal duties resting on officers or

others. Both remedies operate largely in personam.

The writ of mandamus should not "be so perverted as to make it serve the purposes of an ordinary suit." *International Contracting Co. v. Lamont*, 155 U.S. 303, 309 (1894). Mandamus will not lie against a government officer "unless the laws require him to do what he is asked in the petition to be made to do." *Id.*, p. 308. The function of mandamus (and injunction against a federal officer) is to "enforce ministerial duties of executive officers by mandates of Congress." *Transcontinental & Western Air v. Farley*, 71 F.2d 288, 291 (C.A. 2, 1934). The fact that a contract might have been breached under general law does not supply the "law requiring" the officers to convey. As was said in *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 701-702, 704-705 (1949):

* * * the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.

* * * *

* * * For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act.

There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, "The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. . . ."

There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event.

It is argued that a sales agency, such as the War Assets Administration, is not the type of agency which requires the protection from direct judicial interference which the doctrine of sovereign immunity confers. We do not doubt that there may be some activities of the Government which do not require such protection. There are others in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case. That is a function of the Congress. The Congress has, in many cases, entrusted the business of the Government to

agencies which may contract in their own names and which are subject to suit in their own names. In other cases it has permitted suits for damages, but, significantly, not for specific relief, in the Court of Claims.

To entitle appellant to the relief which it seeks under Section 1361, there must be found within that section itself that the United States has waived its sovereign immunity and has consented to be sued through its officers for specific performance. But, as the court held in *McEachern v. United States*, 212 F.Supp. 706, 712 (W.D. S.C. 1963):

This Act does not create new liabilities or new causes of action against the United States Government or its officials. United States Code Congressional and Administrative News, 87th Congress—Second Session, 1962, No. 17, pages 2784, 2785, 2787.

In *Rose v. McNamara*, 225 F.Supp. 891, 893 (E.D. Pa. 1963), the court held that Section 1361 "did not restrict previous notions of sovereign immunity nor did it authorize actions previously prohibited which, though in form against the officer, were in reality against the United States."

The purpose of the bill which became Section 1361 was stated by the Senate Committee on the Judiciary to be (U.S. Code Congressional and Administrative News, 87th Cong., 2d sess., p. 2784):

The purpose of the amendments is to provide specifically that the jurisdiction conferred on the district courts by the bill is limited to compelling a Government official or agency to perform a

duty owed to the plaintiff or to make a decision, but not to direct or influence the exercise of discretion of the officer or agency in the making of the decision * * *.

The Deputy Attorney General of the United States stated in a letter to the Chairman of the Senate Committee on the Judiciary as follows (*Id.*, p. 2788):

We think it essential that the section refer to the "mandamus" power and specifically limit its exercise to ministerial duties owed the plaintiff.

Here again this Court's *White* decision gives the answer in rejecting the claim that the mandamus statute authorized the suit seeking specific relief. This Court said (p. 447):

To find in § 1361 such a revolutionary step on the part of Congress as the overturning of what had been settled law since the foundation of the Government, i.e., that the courts do not have jurisdiction to order the Government to specifically perform its contracts, would be to make too much of a short and simple piece of legislation. In *McEachern v. United States*, 212 F.Supp. 706, 712 (E.D. Va.) the court said, of § 1361:

"The Act does not create new liabilities or new causes of action against the United States Government or its officials,"

and cited the pertinent legislative history in support of its statement. In *Rose v. McNamara*, 225 F.Supp. 891, 893 (E.D. Pa.), the court said that § 1361

"did not restrict the previous notions of sovereign immunity nor did it authorize actions previously prohibited which, though

in form against the officer, were in reality against the United States.”

See also *Sprague Electric Co. v. The Tax Court of the United States*, 230 F.Supp. 779, 782 (D.C.Mass.).

C. *The district court had no jurisdiction to award any relief against the other federal officer defendants.*—The other two federal officer defendants are subordinates of the Secretary of the Interior and the Commissioner of Reclamation. *Dugan v. Rank*, 372 U.S. 609 (1963), and *City of Fresno v. California*, 372 U.S. 627 (1963), are conclusive that a suit of this nature will not lie against local subordinate officers. Here the relief sought is either to secure admittedly federally owned property (the irrigation water) or damages from the United States. There can be no question that such a case is against defendants in their official capacities, seeks to compel official action on their part and, hence, is an attempt to coerce the United States, through its officers. This may not be done, absent congressional consent. Cases such as *Adams v. Witmer*, 271 F.2d 29 (C.A. 9, 1958), reh. den., 271 F.2d 37, which justify relief against such subordinate on the ground that it is awarding purely negative relief (see opinion on rehearing, p. 38), are irrelevant here.⁵

⁵ A basic misunderstanding is shown by the invocation of the quotation from Elihu Root that “these agencies of regulation must themselves be regulated” (271 F.2d at p. 38). The Department of the Interior, in handling reclamation programs, is not an “agency of regulation” but rather is an agency dispensing the bounty of Congress. See *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1957).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully submitted,

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MARCH 1968

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROGER P. MARQUIS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN W. ASHY,)
Appellant,)
vs.)
BARCELIZA G. CRUZ, individually)
and on behalf of her infant child,)
RICHARD ANTHONY CRUZ,)
Appellee.)

On Appeal from the District Court of Guam
for the Territory of Guam

APPELLANT'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN W. ASHY,)
Appellant,)
vs.)
BARCELIZA G. CRUZ, individually)
and on behalf of her infant child,)
RICHARD ANTHONY CRUZ,)
Appellee.)

On Appeal from the District Court of Guam
for the Territory of Guam

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This action was commenced in the Island Court of Guam by the filing of a complaint and summons on March 26, 1964, in which the plaintiff, an unmarried woman, sought support for herself and for her unborn child, attorneys' fees, and medical and clothing expenses, on the ground that the defendant was the father of the unborn child. An amended complaint was filed on August 7, 1964, setting forth, among other things, that the child had been born on May 24, 1964. The action was tried before the Island Court on November 3, 1966, and judgment was entered on January 30, 1967. On appeal, the Appellate Division of the District Court of Guam, on August 31, 1967,

1 affirmed the trial court's judgment.

2 At the trial the plaintiff testified as to sexual intercourse with the defend-
3 ant prior to the birth of the child. Corroboration of the plaintiff's allegations consisted
4 of the results of blood tests indicating that the defendant (together with 25% of the
5 United States population) could not be excluded as the father of the child, and offer-
6 ing the child for the court's viewing. The defendant categorically denied an illicit
7 relationship. Apparently to rebut defendant's statement of seeing the plaintiff about
8 ten times during a seven to eight month period, the plaintiff put on as a rebuttal wit-
9 ness an aunt of the plaintiff, who testified as to visits by the defendant to the plaintiff
10 three times a day during a two or three month period, and sometimes five times a day -
11 a frequency far exceeding plaintiff's own testimony.
12

13 QUESTION PRESENTED

14 Did the plaintiff establish the paternity of the defendant by a preponder-
15 ance of the evidence? Plaintiff testified that she first met the defendant in July of
16 1963 at the home of a friend. The following is quoted from the transcript concerning
17 the first intercourse:
18

19 "Q. When was the first time?
20

21 A. This first time is July or early August or September, in July, August or
22 September, the last part of August or September." Tr. p. 5.

23 On cross-examination, the plaintiff testified as follows regarding the first
24 intercourse, Tr. pp. 17-19:

25 "Q. Now, when you first started testifying, Miss Cruz, you told your
26 attorney that the first time you had sexual intercourse with Mr. Ashy was
in August or September, 1963. Do you remember saying that?

1 A. Yes.

2 Q. Is that correct?

3 A. August.

4 Q. No, you told your attorney the first time that it was either in August
5 or September of 1963. Do you remember saying that?

6 A. Can I change that to August?

7 Q. No, answer my question. Do you remember saying it? Now, will
8 you answer my questions and you and I will get along fine.

9 A. I said August.

10 MR. PHELAN: She did say August or September.

11 THE COURT: Will you answer the question?

12 A. August.

13 Q. No, Miss Cruz, will you answer my question. Do you remember
14 telling your attorney that it was August or September?

15 A. I thought I said August.

16 Q. I didn't ask you what you thought. I am asking you, do you remember
17 telling Mr. Phelan that it was August or September?

18 A. I know I said August.

19 Q. I know you said August. Miss Cruz, do you remember telling your
20 attorney first that you said August and September. Do you remember
21 first, do you remember saying it?

22 A. I said August.

23 Q. Don't look at Mr. Phelan.

24 THE COURT: Answer the question, if you remember saying it or not.

25 A. I don't know whether I said August or September but I know I said
26 August. I don't remember whether I said September because I said so
many months.

1 Q. Well, Miss Cruz, you said in the beginning, indicating you weren't
2 sure you said August or September of 1963 and later when Mr. Phelan
3 said August, you said, yes, August. Now you said you didn't say Sep-
4 tember. Now, do you remember when this first act of sexual intercourse
5 took place, if it ever took place?

6 A. Do you want the exact date?

7 Q. What?

8 A. It was August when he first invited me to his apartment. He said. . .

9 Q. Did you go at that time?

10 A. Yes, I did.

11 Q. Okay, when in August?

12 A. Well, that was September 15, August 15.

13 Q. Do you remember the day of the week?

14 A. August 15.

15 Q. Do you remember the day?

16 A. No, I don't remember the day."

17 The plaintiff, a nurse, testified that the child was born at term (Tr. p. 7),
18 indicating the child would have been conceived about August 24, 1963, yet the plain-
19 tiff testified as to having two periods in September of 1963. Tr. p. 20:

20 "Q. When did you tell him? When did you discover you were pregnant?

21 A. When I had my two periods in September.

22 Q. You had two in September?

23 A. Yes.

24 Q. When?

1 A. Well, the - I always get my period in the first week of September
2 but I had my period in September, the first week but I only had it for
3 two days.

4 Q. You what? You only had it. . .

5 A. For two days.

6 Q. Yes.

7 A. And the last week of September I had my period again and I just
8 had it for two days again.

9 Q. But you had these two periods in September?

10 A. Yes. Normally, I don't have menstruate twice. I had my regular.
11 I was regular with my period."

12 Plaintiff's witness on rebuttal places the time of pregnancy as of June,
13 1963. Tr. p. 50:

14 "Q. Now, you say that in June, July and August you saw him three or
15 four times a day?

16 A. Yes.

17 Q. What time of day would that be?

18 A. Sometimes 10 o'clock, 11 o'clock, 2 o'clock at night.

19 Q. What about September, Mrs. Arceo?

20 A. I tell you the truth, Mr. Phelan.

21 Q. That is Mr. Phelan.

22 A. I mean, Mr. Crain, I beg your pardon.

23 Q. What about September?

24 A. I got lot of work and I did not pay no attention since that. I was
25 serious at that time in June, 1963 because I heard something from my
26 ears.

1 Q. You heard something, from whom?

2 A. From the family, my sister, that Barce got. . .

3 Q. Your sister is Miss Cruz' mother?

4 A. Yes, that Barce got accident, pregnancy, so I just give up, what
5 is the use."

6 Plaintiff's case is replete with references to witnesses who could have
7 allegedly corroborated plaintiff's testimony. Tr. pp. 11 and 12:

8 "Q. Were you engaged to Mr. Ashy?

9 A. Well, he always told me that we will get a house. We will get
10 married and have plenty of kids.

11 Q. Did Mr. Ashy tell that to anybody else in your presence?

12 A. Yes, he always tell them we are getting married and they could come
13 to our wedding.

14 Q. Do you know of any person he said that to?

15 A. Yes.

16 Q. Could you name them?

17 A. Rosa Castro and many of our friends you know."

18 Tr. p. 14:

19 "Q. You testified previously that there was some sort of an engagement
20 or what steps besides talking to some people did Mr. Ashy take?

21 A. Well, he said he will do anything for me and since I was a Catholic,
22 I try to marry in the Catholic Church. So, he said he will do anything
23 to get married so I took him to the priest you know and he was taking
instructions at Sinajana.

24 Q. When was this that you took him to the priest?

25 A. This was September, 1963.

1 Q. Do you recall the name of the priest?

2 A. Yes, Father Antonine.

3 Q. Do you know whether or not to your knowledge you went there more
4 than once?

5 A. Yes, we went there about three or four times."

6 On cross-examination of the defendant, plaintiff's counsel indicated there
7 were additional corroborating witnesses. Tr. p. 41:

8 "Q. Didn't you tell the waitress up at Pirates Cove that you two were
9 getting married and didn't she ask if she was invited, and didn't you
10 tell her, yes?"

11 and, Tr. p. 44:

12 "Q. And you say you never told the waitress at Pirates Cove that you
13 two were getting married?"

14 Defendant denies making this statement.

15 ARGUMENT

16 The appellant contends that the appellee has not established the paternity
17 of the child by the greater weight of the evidence. Paternity cases are easy to bring
18 and difficult to defend. The burden on the appellee is a preponderance of the evidence
19 or the greater weight thereof. Her testimony need not be corroborated. Section 1844
20 of the Code of Civil Procedure of the territory of Guam even codifies this last state-
21 ment by stating, "The direct evidence of one witness who is entitled to full credit is
22 sufficient for proof of any fact, except perjury and treason."

23 The appellee's case rests on her own testimony. Section 1847 of the Code
24 of Civil Procedure of the territory of Guam is therefore applicable:
25
26

1 "A witness is presumed to speak the truth. This presumption,
2 however, may be repelled by the manner in which he testifies,
3 by the character of his testimony, or by evidence affecting his
4 character for truth, honesty, or integrity, or his motives, or by
5 contradictory evidence; and the judges are the exclusive judges
6 of his credibility."

7 The appellee's testimony is self-contradictory, vague, self-interested and
8 directly contradicted by the testimony of the appellant. Appellee's own testimony as
9 quoted in the Question above, gave the impression that every material fact could be
10 corroborated, such as his admission of paternity, his desire to marry her, and his taking
11 of instruction for marriage.

12 In the many California cases that have been examined relative to this prob-
13 lem of the burden of proof in paternity cases, there is important corroboration in those
14 cases where the burden of proof has been met. The case of Girardin v. Hall, 156 CA
15 2d 709, 320 P 2d 163, 1958, is one example. In this case the man admitted frequent
16 acts of sexual intercourse and that he had indeed cohabited with the unwed mother. In
17 the case of Berry v. Chaplin, 74 CA 2d 652, 169 P 2d 442, 1946, the man admitted
18 prior acts of sexual intercourse but not acts at a time which would have been the normal
19 time of conception. The court held that the prior acts tended to show the probability
20 of a repetition of the illicit acts. Another case showing important corroboration is
21 Whitelaw v. Whitelaw, 122 CA 260, P 2d 874, 1932. In this case the man asserted
22 that the child could not be his because his admitted act of sexual intercourse had oc-
23 curred 230 days prior to the birth of the child. In the case now on appeal there is not
24 a single corroborative bit of testimony as to the intercourse other than the bald asser-
25 tion of the appellee.
26

1 A second type of important corroboration that appears in many of the cases
2 in which the court has found that the proof would support the judgment, is oral admis-
3 sion by the putative father. In the case entitled In re Girds' Estate, 157 C 534, 108 P
4 499, 1910, the father publicly acknowledged the illegitimate child as being his own.
5 In the case of In re Baird's Estate, 173 C 617, 160 P 1078, 1916, the delivering phy-
6 sician himself testified as to the admission by the father of his paternity, and exhibited
7 the birth certificate that the father had filled out and had registered in which he had
8 himself named as the father of the illegitimate child. In the case now on appeal, no
9 such corroboration exists, although again the appellee would lead the court to believe
10 that there were witnesses to such admissions.
11

12 The testimony of the rebuttal witness, Mrs. Arceo, is contrived and con-
13 tradicts appellee's testimony, not only as to the time of conception as set forth above
14 in the Question Presented, but in the number of visits of the appellant to the appellee.
15 In her testimony Mrs. Arceo states that the appellant was sometimes seen five times a
16 day (Tr. p. 49).
17

18 In contrast to the appellee's own testimony and to that of the rebuttal wit-
19 ness called on her behalf, the testimony of the appellant is clear, unequivocal, and
20 believable. One example of how clearly his testimony rings true is found on page 38
21 of the transcript, where he is asked concerning the appellee's testimony as to instruc-
22 tions from Father Antonine. He stated that he went twice with the appellant to see a
23 priest, although not for the purpose she had stated, and that the priest was not Father
24 Antonine but rather Father Kieran. One familiar with eliciting the truth from witnesses
25
26

1 knows that if the truth is being concealed, a complete denial is the common course.
2 In this case the appellant admitted to visits and corrected the appellee's testimony as
3 to the priest visited.

4 By virtue of Section 1847 of the Code of Civil Procedure of the territory
5 of Guam, it is seen that the testimony of the appellee cannot be believed and there-
6 fore the appellee has failed to establish the paternity of the child by the greater weight
7 of the evidence.
8

9
10 CONCLUSION

11 The appellant therefore prays that the Court reverse the Opinion of the
12 District Court of Guam and dismiss the appellee's complaint.

13 Dated May 20, 1968, at Agana, Guam.

14 Respectfully submitted,

15 CRAIN & BENSON
16 Attorneys for Appellant

17
18 BY: Richard H. Benson
19 RICHARD H. BENSON

20 CERTIFICATE OF COUNSEL

21 I certify that in connection with the preparation of this brief I have exam-
22 ined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and
23 that, in my opinion, the foregoing brief is in full compliance with those rules.
24

25 Richard H. Benson
26 RICHARD H. BENSON, Attorney for
Appellant

No. 22,415

IN THE

**United States Court of Appeals
For the Ninth Circuit**

IRVIN RAPOPORT,

Appellant,

vs.

ROSE RAPOPORT, also known as JOAN
SIROTT,

Appellee.

**Appeal from the United States District Court
for the District of Nevada**

APPELLANT'S OPENING BRIEF

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NOTE: Other authorities cited in quotations from the author listed *supra*, either in the body of such quotations or footnotes thereto, and which appear in this Brief as a result of such quotation only, are not themselves listed in the foregoing compilation of authorities.

Abbreviations Used in This Brief

“CT...” refers to the clerk’s transcript and pagination.

“RT...” refers to the reporter’s transcript and pagination of the hearing held July 31, 1967.

“X” refers to exhibits offered at said hearing by both appellant and appellee.

Note: All emphasis used in this Brief has been added by court except where otherwise indicated.

No. 22,415

**United States Court of Appeals
For the Ninth Circuit**

IRVIN RAPOPORT,	} <i>Appellant,</i>
VS.	
ROSE RAPOPORT, also known as JOAN SIROTT,	
	} <i>Appellee.</i>

**Appeal from the United States District Court
for the District of Nevada**

APPELLANT'S OPENING BRIEF

This is an appeal from a judgment entered by the United States District Court for the District of Nevada declaring appellee's alleged Nevada divorce decree on July 6, 1964, to be valid, and by so doing, refusing by necessary implication the extension of Full Faith and Credit to a Pennsylvania Decree previously entered on June 24, 1964, permanently restraining appellee, *inter alia*, from pursuing her Nevada action. This judgment of the Court below arose from an Action for Declaratory Judgment instituted by appellant, praying for a declaration that since the Pennsylvania injunction was entitled to the

protection of the Full Faith and Credit clause¹ and the Fourteenth Amendment of the Constitution, the later Nevada divorce decree was null and void.

JURISDICTION

Jurisdiction of the District Court is based upon 28 U.S.C. §2201 (the Federal Declaratory Judgment Act) and 28 U.S.C. §1332. Jurisdiction of this Court is based upon 28 U.S.C. §2201. The judgment was entered August 23, 1967 (CT 163, 164). The Notice of Appeal was filed within the 30-day period provided by 28 U.S.C. § 2107.

STATEMENT OF THE CASE

On December 19, 1963, appellee instituted an Action for Divorce in Montgomery County, Pennsylvania (XI, RT 6, CT 263) alleging in her Complaint both her residence and that of appellant in said county (XI, RT 6, CT 265). On January 9, 1964, an Appearance and Warrant of Attorney was filed for appellant (as defendant therein) (XI, RT 6, CT 276-280), and that same day appellant ruled his wife for a Bill of Particulars (XI, RT 6, CT 281). On February 24, 1964 she filed a Petition seeking alimony pendente lite, to which he responded on February 26 by filing an Answer alleging that wife had removed from the

¹Article IV, § 1, Constitution of the United States: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State . . ."

home (where they had lived with two teen-age children) in order to “live with her paramour, one George Sirott” and that since the institution of the suit, she and Sirott had “been living together in open, notorious adultery” and that he was supporting her more than adequately, being “a wealthy man” (XI, RT 6, CT 290).

On the basis of this Answer, the Court on March 6, 1964 ordered that depositions be taken within 90 days (XI, RT 6, CT 283), and *appellant* thereupon, on April 2, 1964, noticed his wife for the same, to be held on April 6, 1964 (XI, RT 6, CT 293). Appellee responded by filing a Motion for Protective Order on April 3, 1964 to avoid being deposed. This document does not disclose any claim *that she had already moved to Reno and intended to live there*, although such reason might have defeated the taking of her depositions (X 1, RT 6, CT 303) *and in her Nevada suit for divorce, she claimed residence in Nevada since March 25, 1964 (X 3, RT 7, CT 29) nine days earlier.*

On April 17, 1964, counsel for both parties agreed to continue this Motion to May 1, 1964 (X 1, RT 6, CT 302), on which date, appellant having previously filed an Answer thereto (X 1, RT 6, CT 297-300), the Court, on appearance of both counsel, ordered this Motion also on the Argument List after the taking of depositions (X 1, RT 6, CT 301).

Six days later, on May 7, 1964, appellee commenced her action for divorce in Reno, Nevada (X 3, RT 7, CT 29) (even though, as we have seen, she had con-

tinued to press her Pennsylvania action during the alleged prior six-week residence in Nevada).

Appellant was neither served nor did he appear personally or by counsel in the Nevada action (CT 157). Instead, he filed a Complaint in Equity in Pennsylvania seeking an injunction to restrain his wife from proceeding with the Nevada suit, and secured a preliminary injunction on May 20, 1964 on his affidavit setting forth all the foregoing facts (X 2, RT 6, CT 194-196).

Service of the same was made upon appellee at her Pennsylvania residence; on both her Pennsylvania and Nevada attorneys; the Nevada Clerk of Courts (who promptly sent it back with a printed form requesting an Appearance and a fee); on the Attorney General of Nevada; and on all the judges of the Washoe County Court; by registered mail (X 4, RT 8). On this service and the succeeding ones, most of the Notices addressed to the judges were returned unopened, marked either "Unclaimed" or "Refused" (X 4, RT 8). The Pennsylvania Court having fixed June 24, 1964 as the date for a hearing on the merits, notice of this hearing was served as before, with the same results (X 4, RT 8). On that date, appellee not being present, appellant testified and produced his wife's letters postmarked March 31, April 28 and May 6, 1964 from New Jersey (X 15, 16, 17, RT 13-16, 18, 19) the first two bearing, in appellee's handwriting, her Pennsylvania residence as the return address (RT 14, 15). The Court thereupon concluded that this evidence sustained appellant's averments

and established not only the existence of a prior and pending action on the same subject matter, but appellee's fraudulent attempt to secure a false but colorable residence in Nevada; and entered a Permanent Decree enjoining her (in six sections) from interfering with her husband's marital and property rights, including pursuit of the Nevada divorce. The Court did not merely "confirm" or "continue" the temporary injunction, but entered an entirely new Decree (X 2, RT 6, CT 244, 245).

Service of this Decree was effected as before, the major difference being that appellee was physically handed the same in Reno (X 2, RT 6, CT 262).

Two days later, she received an *ex parte* divorce from a judge who indicated on the record that he had knowledge of this Decree (X 3, RT 7, CT 43); and that same day went through a marriage ceremony with Sirott at which her Nevada attorneys were her witnesses (X 12, RT 13).

As a result, appellant instituted his Action for Declaratory Judgment, averring specifically (a) the prior exclusive jurisdiction of Pennsylvania over both parties and subject matter; (b) the prior and valid Pennsylvania Decree of Injunction and its entitlement to Full Faith and Credit, with the resultant *res judicata*; and (c) the consequent nullity of the Nevada decree and violation of Due Process arising therefrom (CT 5-8).

Appellee's Motion for Summary Judgment being denied (CT 106-8), appellee was deposed on July 26,

1967, and the case tried by the Learned Court below on July 31, 1967. The only fact issue was the subsidiary one of appellee's domicile between March 25 and May 7, 1964 (subsidiary because no challenge, by pleadings or otherwise, to the accuracy and regularity of the records establishing Pennsylvania's prior jurisdiction over parties and subject matter and the decree of injunction it entered, based on the same—X1, X2—was ever made by appellee). This single issue was accordingly tried.

This trial resulted in the entry of the judgment from which plaintiff appeals.

QUESTIONS PRESENTED

(1) Under the facts, did not Pennsylvania possess prior exclusive jurisdiction over both parties and subject matter, and retain that jurisdiction in all subsequent proceedings arising therefrom?

(2) Since the Pennsylvania decree of June 24, 1964 arising from such exercise of jurisdiction, is not merely the prior decree, but a valid final decree, is it not entitled to Full Faith and Credit under Article IV, § 1 of the Constitution of the United States?

(3) Was not the Nevada Court, under the doctrine of *res judicata*, barred from subsequently litigating the same issues in an identical suit between the same parties, and entering judgment thereon?

(4) Is not such Nevada judgment void for lack of jurisdiction, and consequently in violation of the Fourteenth Amendment to the Constitution?

(5) Is not the acceptance and validation of such Nevada decree by the Learned Court below at variance with the ruling of the United States Supreme Court in *Sutton v. Leib*?

(6) Did not the Learned Court below, under the circumstances, commit basic error by finding that Pennsylvania lacked jurisdiction over the subject matter and that Nevada had acquired the same?

(7) Did not the Learned Court below commit basic error in finding that appellee was a Nevada domiciliary?

(8) Did not the Learned Court below commit basic error in applying both Federal and Pennsylvania case law to the instant facts?

SPECIFICATION OF ERRORS

Pursuant to Rule 18 (d) of this Court, appellant respectfully submits that the District Court erred:

1. When it failed to find under the facts that Pennsylvania possessed prior exclusive jurisdiction over both the parties and the instant subject matter.

2. When it failed to find as a matter of law that Pennsylvania retained such jurisdiction in the subsequent equity proceeding arising from the same subject matter.

3. When it failed to find that the Pennsylvania decree of June 24, 1964 was the prior decree over the parties and the subject matter.

4. When it found that said Pennsylvania decree was not final but provisional.

5. When it failed to afford said Pennsylvania decree Full Faith and Credit as prayed for by appellant, in the case at bar.

6. When it failed to find that the Nevada Court was barred by *res judicata*, from making findings concerning its own jurisdiction over the parties and subject matter.

7. When it failed to find that the resultant Nevada decree was accordingly void and in violation of the Due Process clause of the Fourteenth Amendment.

8. When the Court itself challenged the jurisdiction of the Pennsylvania Court, although likewise barred by *res judicata*.

9. When it entered judgment at variance with the principle established by *Sutton v. Leib*.

10. When it found as a fact that appellee was a Nevada domiciliary when the Pennsylvania Court, under the facts, is conclusively presumed to have previously found that she was not.

11. When it found that Nevada had jurisdiction over the parties and subject matter sufficient to create a valid divorce.

SUMMARY OF ARGUMENT

I. Pennsylvania had prior exclusive jurisdiction over both parties and subject matter, and retained said jurisdiction in all proceedings arising from the same.

II. The Decree of Injunction it entered on this basis was therefore not only the prior judgment, but the prior valid and final judgment; the fact that it was a Decree in Equity rather than a judgment at law is immaterial; and such a judgment is entitled to Full Faith and Credit under Article IV, § 1.

III. That as such, it is valid in Nevada and in the Federal Court for Nevada as well as Pennsylvania, under *Sutton v. Leib*.

IV. That the Nevada state Court and the Learned Court below are both barred from attacking Pennsylvania's finding of jurisdiction and the facts on which that jurisdiction is based, under the doctrine of *res judicata*.

V. That the Nevada decree was therefore void for lack of jurisdiction, and was thus in violation of the Fourteenth Amendment; and the Court below erred in finding that the Nevada Court possessed the same.

VI. That the Court below erred in holding that the *March Estate* case controlled the instant facts adversely to appellant's position when in fact that case is clearly distinguishable.

ARGUMENT

Since it is clear from all the pleadings, testimony, exhibits and memoranda filed in this case, that the fundamental question facing your Honorable Court is what evaluation or credit is to be accorded two conflicting decrees: (1) The Pennsylvania decree of June

24, 1964, enjoining and restraining appellee from securing a divorce decree in a subsequent Nevada action, rather than the one in which she was then actively engaged in Montgomery County, Pennsylvania, or remarrying on the basis of such decree; and (2) The Nevada decree of July 6, 1964, granting her such divorce: it would appear appropriate to strip away all collateral problems and, in the interest of analysis, attack one fundamental question first:

Did either of the Courts entering these decrees, *when they were entered*, have to take into consideration the effect of the other?

The Pennsylvania decree was entered, as indicated *supra*, almost two weeks before the other; and the documents, affidavits of service, and notes of testimony in the Nevada state Court resulting in the Nevada decree (X 3, RT 7; CT 43) leave no doubt that appellee, her agents, and even the Nevada Court had knowledge of the nature of the Pennsylvania decree on July 6, 1964 (when the Nevada decree was entered).

Since it will further be noted (Statement of the Case, *supra*, p. 2 this Brief) that appellee herself first placed her marital status in issue in Pennsylvania on December 19, 1963, does this fact, under the law, have any bearing on the choice of our initial inquiry?

Appellant respectfully submits that it does; that by case law so well-established and so uniform as to reduce the principle to hornbook status, the state which has acquired prior jurisdiction over the parties and the subject matter is entitled to exclude another Court

from taking subsequent action over the same parties and issues; that the first Court to assume and exercise such jurisdiction acquires exclusive jurisdiction: *Simmons v. Sup. Ct.*, 96 Cal. App. (2d) 119, 214 P(2d) 844 (1950); *Williams v. Payne*, 150 Kan. 462, 94 P (2d) 341 (1939): that, moreover, such Court should be permitted to retain its jurisdiction without interference from other states. *James v. Grand Trunk Western R. Co.*, 14 Ill.(2d) 356, 152 NE(2d) 858 (1958) in commenting on this rule, refers to former Illinois decisions in the following language:

“Consequently, those decisions” (*Kleinschmidt v. Kleinschmidt*, 343 Ill. App. 539, 99 NE(2d) 623, and *Allen v. Chicago G.W.R.Co.*, 239 Ill. App. 238) “lend authority to plaintiff’s contention that a court which first obtains jurisdiction on the merits should be permitted to retain it until the cause is finally adjudicated, without interference from the courts of other states. In fact, the *Allen* case reaffirms and quotes from the *Kavanaugh* case, where that rule is stated at page 183 of 233 Ill., at page 181 of 84 NE: ‘A person has the right to select such tribunal having jurisdiction as he chooses for the prosecution of his rights and the court which first obtains jurisdiction will retain it. Such jurisdiction cannot be defeated because the defendant may prefer another tribunal in which he supposes the decision will be more favorable to him.’”

The Federal rule is the same. *Cole v. Cunningham*, 133 U.S. 107, 10 S.Ct. 269 (1890). This has also been the Pennsylvania rule since the venerable case of *Mc-*

Pherson v. Cunliff, 11 S. & R. 422, 429, 14 Am. Dec. 642 (Pa. 1824). For exhaustive annotations on this general principle, see 54 A.L.R. (2d) 1240, which flatly states, citing many cases, in § 2, p. 1243:

“Irrespective of the domicile of the spouse seeking the divorce, injunctive relief will be granted where the courts of the injunction forum have first acquired jurisdiction of a matrimonial action between the parties” (which) “would be deprived of its effect by the maintenance of a divorce action in a foreign jurisdiction.”

We are therefore obliged to assume that such a Court, under threat of divestiture of its jurisdiction in another state, will take some step resulting in an order, judgment or decree to prevent this from occurring, and seek to have it act as a bar to the foreign proceeding. It is submitted that our next inquiry is, logically, a three-fold one: (1) What kind of judgment is required, under our law, before it may be considered to act as a bar to such other proceeding? (2) What kind of judgment was entered by the Pennsylvania Court (in the instant case, the Court of prior jurisdiction) in its attempt to bar the appellee in the Nevada action, and did it have the power to enter such a judgment? (3) Did its judgment qualify, under the requirements of Number (1) *supra*, to act as a bar, and if so, to what extent and on what issues?

Upon the answers to these questions, appellant suggests, hinges the obligation of the sister state (Nevada) to either extend or refuse Full Faith and Credit to the Pennsylvania judgment, under Article IV, Section 1,

of the Constitution of the United States. *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207 (1942).

The questions will be considered in order.

1. The accepted definition of a valid judgment in this connection (which can be supplemented by copious case law from every jurisdiction) is found in The Restatement of the Law, *Conflict of Laws*, § 429, as follows:

“A judgment, decree or other order of a court is valid if, but only if:

“(a) it is rendered by an impartial tribunal after reasonable notice and an opportunity to be heard has been given to all persons to be bound thereby;

“(b) the state in which it is rendered has jurisdiction to act judicially

“(i) with respect to the person affected, or

“(ii) with respect to the subject matter thereof;

“(c) no limitation upon the exercise of judicial jurisdiction by the state has been exceeded;

“(d) the court is competent by the law of its state to exercise judicial jurisdiction.”

From this recognized definition flows the corollary that:

“A valid judgment rendered in one state will be recognized in another state as imposing upon the party against whom it was rendered a duty to obey the judgment, or as determining interests in a thing or the status of the parties.”

Restatement, *Conflict of Laws*, § 430.

It is to be noted that the phrase is not "should be recognized" or "might be recognized": it is the mandatory "will be recognized." A valid judgment is not entitled merely to some, but full faith and credit in a sister state. *Davis v. Davis*, 305 U.S. 32, 59 S.Ct. 3 (1938); see also *Dorney v. Dorney*, 245 F(2d) 201 (4 Cir. 1957).

We see at once that a mere preliminary or interlocutory decree of injunction, being issued on *ex parte* affidavits and without adequate notice to the other side, will not qualify at all under the above definition; but appellant is not urging that his Preliminary Injunction of May 20, 1964 is valid *for the purpose of extending it Full Faith and Credit*. His scrutiny is directed to the facts supporting the Decree of June 24, 1964, permanently enjoining appellee from proceeding with her pending Nevada divorce action or remarrying upon the supposed validity of any decree so entered, or otherwise interfering with the marital or property rights of appellant. (This is the decree characterized by the Court below as "confirming the preliminary injunction" (CT 158); this will be discussed *infra*).

2. The entire record before this Honorable Court discloses that the Court of Common Pleas of Montgomery County, Pennsylvania, a Court having equity jurisdiction as well as jurisdiction in divorce matters: *Strank v. Mercy Hospital*, 383 Pa. 54, 117 A(2d) 697 (1955): heard the case (X 2, RT 6); notice of the Preliminary Decree of May 20, 1964 and of the hearing for a Permanent Injunction to be held on June 24, 1964 was afforded by timely notices, *which were received*,

by her Pennsylvania attorney who had instituted *on appellee's behalf* (X 2, RT 6) a Pennsylvania action for divorce previously (RT 12) which was still in progress (X 1, RT 6); on her Nevada attorney (X 4, RT 8); on the Clerk of Courts of Washoe County, Nevada (X 4, RT 8); and at the Pennsylvania residence which defendant herself had sworn to be her residence, under affidavit, in the Pennsylvania Court (X 2, RT 6). All of these persons (and others) were supplied not only with copies of plaintiff's Complaint in Equity for an Injunction, but copies of both the Preliminary and Permanent Decrees when issued (X 2, RT 6; X 4, RT 8). *The defendant herself received physical, personal service of the Permanent Decree of Injunction before she set foot in the Nevada Court to testify and receive her Decree of Divorce.* (X 2, RT 6).

‘All of the foregoing is a matter of record in the case at bar, elicited either in testimony or properly introduced documents, or both; and it establishes, beyond peradventure of doubt, that a properly constituted Pennsylvania Court, after due notice and hearing, entered an injunction against her.

Since the requirements of the Restatement's Section 429(a) and (d) have clearly been met, it remains only to be seen whether the jurisdictional requirements set forth in (b) and (c) have also been present.

Appellant respectfully submits that they have most decisively been met, the principles of law applicable to this case being set forth once again in the Restatement, *Conflict of Laws*, in § 76 and § 77(1)(e), pp. 114, 115, as follows:

“Section 76. Continuation of Jurisdiction. If a court obtains jurisdiction over a party to an action, that jurisdiction continues throughout all subsequent proceedings which arise out of the original cause of action.”

“Section 77. Bases of Jurisdiction. (1) The exercise of jurisdiction by a state through its courts over an individual may be based upon any of the following circumstances:

.
 (e) He has by acts done by him within the state subjected himself to its jurisdiction.”

Appellee herself instituted an *action for divorce* on December 19, 1963 (X 1, RT 6, CT 265-273) in the very jurisdiction which she now claims was incapable of entering an order controlling (of all things) *her marital status*. It is difficult to see what other status she had indeed called upon it to adjudicate by commencing this suit. In her Complaint she averred her residence to be 1355 Overbrook Road, Montgomery County, Pennsylvania (the jurisdiction in which she had started suit), and her Pennsylvania citizenship (X 1, RT 6, CT 265). *Nowhere in any of her succeeding pleadings in this action did she ever aver her change of residence or domicile, although in her Motion for Protective Order filed April 3, 1964 (X 1, RT 6, CT 303) it would have been advantageous for her to do so; and as of April 3, 1964, she now claims to have resided in Nevada for the previous ten days.*

Under Pennsylvania law (which must of necessity determine the validity of a Pennsylvania decree), a domicile once established is conclusively presumed to

continue until the party alleging the change proves, by a preponderance of the evidence, that the domicile has in fact changed. *In re Coulter's Estate*, 406 Pa. 402, 178 A(2d) 742 (1962); *Obici's Estate*, 373 Pa. 567, 97 A(2d) 49 (1953); and *Smith v. Smith*, 364 Pa. 1, 70 A(2d) 630 (1950). See, also, *Sirott v. Sirott*, *infra*, this Brief. This appellee never even attempted to do.

Nor has she been aided in this respect by appellant, who steadfastly asserted her Pennsylvania residence and domicile in all relevant pleadings in the Pennsylvania divorce action (X 1, RT 6, CT 293) and in his equity suit seeking an injunction (X 2, RT 6, CT 180-182, 185).

Moreover, she was still actively pursuing her Pennsylvania action on May 1, 1964, when her Motion for Protective Order was continued by the Pennsylvania Court for the taking of depositions (X 1, RT 6, CT 301).

On May 1, 1964, then, the Pennsylvania Court had jurisdiction over the subject matter because *appellee* had submitted that subject to a Court of a jurisdiction competent to consider it; over the appellant, by personal service of process; and over appellee herself by virtue of her voluntary submission.

It is almost axiomatic that when one state Court acquires jurisdiction of the subject matter of the case, no Court of coordinate jurisdiction will interfere with its action, or entertain a second suit involving the same subject matter, subject only to the qualification that in the first suit, the party who would be plaintiff

in the second case (here, the appellee) is afforded an adequate and complete opportunity for adjudication of her rights. This is unquestionably the law of Nevada. *Mendive v. Third Judicial District*, 70 Nev. 51, 56, 253 P(2d) 883 (1953); *Metcalf v. Second Judicial District*, 51 Nev. 253, 274 Pac. 5 (1929).

In fact, by Nevada law so well established that it goes back more than seventy years, not even the consent of both parties will operate to divest one Court of its jurisdiction and confer it on another. *Gamble v. First Judicial District*, 27 Nev. 233, 246, 74 Pac. 530 (1903); *Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570 (1895).

Nevada has also held that even the Court itself may neither invest nor divest itself of jurisdiction by an erroneous ruling made in its exercise. *Pacific States Sec. Co. v. District Court*, 48 Nev. 53, 226 Pac. 1106 (1924).

On May 1, as we have seen, appellee was diligently pursuing the cause in Pennsylvania. How dare we presume, then, that she alone, moving unilaterally and actuated exclusively by self-interest, could divest the Pennsylvania Court of jurisdiction and confer it on Nevada?

Nevertheless, *just six days later, on May 7, 1964*, she commenced an action for divorce in Nevada, in which she asserted, and the Nevada Court found, that it had jurisdiction.

In view of all of the foregoing, we are led to ponder by what legal prestidigitation this miracle was accomplished.

It is inevitable, after recital of the facts *supra* relating to Pennsylvania's prior jurisdiction over both the parties and subject matter, that we must conclude that subsection (b) of the Restatement requirements for a valid judgment in § 429, has also been met.

Did the Pennsylvania Decree of Permanent Injunction comply with the requirement of subsection (c), to the effect that the Court must not exceed its judicial jurisdiction in entering such a Decree?

Since the Court first acquiring jurisdiction has not merely the power but the duty to protect its jurisdiction, it may issue perfectly valid injunctions restraining a party from proceeding on matters arising out of the same subject matter in other Courts. Since, however, an injunction acts *in personam* against the injunction defendant, that defendant, to be bound, must be found to be personally within the jurisdiction of the Court. *Janney v. Janney*, 350 Pa. 133, 38 A(2d) 235 (1944).

This finding the Court makes (under present circumstances) on the unshakable premise that the injunction defendant (the appellee here) *is already subject to the Court's jurisdiction by virtue of her prior voluntary submission to it of the subject matter still unresolved*. *Dorney v. Dorney*, *supra*; *James v. Grand Trunk Western R. Co.*, *supra*; *Doerr v. Warner*, 247 Minn. 98, 76 NW(2d) 505 (1956); *Bedient v. Bedient*, 74 N.Y.S.(2d) 456, 190 Misc. 480 (1947) (a case remarkably similar to the instant case in its factual background). Accord, *State Tax Commission v. Cord*, 81 Nev. 403, 404 P(2d) 422 (1965).

In *Dorney v. Dorney*, *supra*, a husband brought an action for divorce in New Hampshire and subsequently moved to dismiss the same. He then filed a divorce suit in Nevada. His wife filed a cross-petition for separate maintenance in the New Hampshire suit. Shortly thereafter, the husband was awarded a Nevada decree, no personal service on his wife having been made, nor did she appear in the suit. Under this decree, the husband was obliged to pay only \$50 for her maintenance. In the meantime, the New Hampshire Court refused to dismiss the divorce action and entered a \$250 order on the wife's behalf for her maintenance.

She subsequently sued for arrears accumulated under this order in the Federal District Court in West Virginia, which awarded her these arrears, and the husband appealed.

The Circuit Court of Appeals, in its opinion, quoted the following language from the opinion of the New Hampshire Court in support of its reasoning that New Hampshire's jurisdiction continued (pp. 202, 203):

"The plaintiff chose his forum and submitted himself to the jurisdiction of the court by seeking a divorce. Until the voluntary dismissal of his action goes to judgment, he is subject to the court's jurisdiction. The defendant came into court seeking affirmative relief while the plaintiff's action was still pending and while plaintiff was represented in his action by counsel of his own choosing. . . . It has been a long standing practice to treat cross-petitions seeking affirmative relief as pleadings in the original action. No service thereon is required but copies of all pleadings filed in court

are required to be forwarded forthwith 'to all other parties to the action or their counsel' . . . A copy of defendant's pleadings was sent to and received by plaintiff's counsel at the time of their filing in court. Jurisdiction over plaintiff in connection with the matters contained in the cross-petition was thereby secured."

Said the Court (after referring to the above language):

"The New Hampshire court held, for the reasons set out in its opinion heretofore quoted, that it did" (have jurisdiction over person of husband). "We agree. The judgment was a valid one and the District Court, quite correctly, held that it was entitled to full faith and credit in that Court. The judgment of the District Court is affirmed."

Supra, at p. 207.

Since it is the validity of a Pennsylvania injunction that is being considered, however, it is Pennsylvania law that controls.

Pennsylvania follows the foregoing rule, this principle of law being understood and applied to situations identical to the case at bar.

In *Wenz v. Wenz*, 400 Pa. 397, 162 A(2d) 376 (1960), a wife sought relief in a Pennsylvania Court under an antenuptial agreement. Her husband appeared, and filed an answer denying the marriage, and then instituted an action for annulment in Maryland. Upon the wife's application for an injunction to restrain him from this suit, the husband attacked the jurisdiction of Pennsylvania to issue an injunction; and when it was granted, he appealed. Said the Court:

“It is plain enough that Wenz, by his answer to the Complaint in Lehigh County, voluntarily put the validity of his marriage to the plaintiff in issue there and by subsequently instituting suit in the Maryland Court, for annulment of the marriage, contumaciously attempted to circumvent and subvert the authority and jurisdiction of the Lehigh County Court. In such circumstances, a court has not only the power but the duty to thwart such an undertaking by a restraining order adequate to the circumstances . . . In such a case it may restrain a party from prosecuting a subsequent suit in another jurisdiction, whether the objects of the two suits are the same or not, if the effect of the second suit is to withdraw from the court first acquiring jurisdiction a part of the subject matter of the first suit . . .”

Accord, 43 C.J.S., *Injunctions*, § 49, p. 499.

In *Rothman v. Rothman*, 424 Pa. 406, 228 A.(2d) 899 (1967), a case on all fours with the case at bar, the husband, a defendant who had appeared by counsel and filed an answer to a Pennsylvania action for divorce, went to Nevada and instituted a Nevada action for divorce. Pennsylvania, on his wife’s application, promptly enjoined him under the same principle. On appeal the Supreme Court affirmed and approved the *Wenz* rule, the Court stating (at 408, 9):

“The court (below) based its conclusion on our decision in *Wenz v. Wenz*, 400 Pa. 397, 162 A.(2d) 376 (1960) . . .

We hold that Wenz is controlling in this situation, and that the language of Rule 1503(a)(2) is consistent therewith. That rule states that:

‘. . . a judgment, order or decree shall not bind a defendant personally unless he is served within the County, or within the Commonwealth in conformity with Rule 1504(b) or unless he appears *or otherwise submits himself to the jurisdiction of the Court.*’ (Emphasis supplied). We agree with the conclusion of the court below that it had twice obtained jurisdiction over appellant, in the divorce action and the action for support, in matters dealing with the marital affairs of the parties. The court, therefore, was justified in assuming jurisdiction in the equity proceeding, and we need not, nor do we, decide the propriety of the attempted service of process. Inasmuch as appellant had submitted himself to the jurisdiction of the court in the previous actions, its decree in the equity action may properly bind him.”

Appellant respectfully urges that the *Wenz* and *Rothman* cases not only apply here, but their reasoning carries the force of a legal imperative: to hold otherwise would open a veritable Pandora’s Box to the chicanery of every evasive party who seeks to benefit by circumventing the jurisdiction of our Courts. She may conceal her residence and claim she doesn’t live there, hoping the Court will decide she has not been served. She may claim she has moved to A; her agent may claim she has moved to B; while in fact she has moved to C and concealed herself, hoping for the same result. The variations on these devices are virtually endless, being limited only by the ingenuity of the person involved to confuse the Courts, the issues, and the opposing party.

3. The fact that Pennsylvania herein entered a Decree of Injunction in Equity rather than a judgment at law in no way extinguishes or diminishes its right to recognition as a valid judgment under the *Restatement* rule, § 430 hereinabove set forth, if it otherwise qualifies.

“An order, judgment, or sentence of a court of chancery is commonly termed a ‘decree’. It is just as binding on the parties and conclusive as to the matters in controversy as is a judgment of a court of law; no distinction is to be drawn between the one and the other.² It may be presumed that a chancellor in a matter over which he had jurisdiction made a proper investigation as to the truth of the allegations contained in an application made to him.

... A decree is final if it disposes of the cause or a part thereof, reserving no question or direction for future determination.” 19 Am.Jur. §406, pp. 278, 279, citing *Beasley v. Texas & P.R. Co.*, 191 U.S. 492, 24 S.Ct. 164, 48 L.ed. 274 (1903).

Pennsylvania law has been in accord with both parts of the above principle for many years. *Evans v. Tatem*, 9 S. & R. 252, 11 Am.Dec. 717 (Pa. 1823); *Sundheim v. Beaver County B. & L. Ass’n*, 140 Pa. Sup. 529, 14 A.(2d) 349 (1940).

The Decree of June 24, 1964 permanently enjoining appellee from prosecuting her Nevada divorce action, *inter alia*, is emphatically urged by appellant to be a valid and final decree in accordance with the above

²Citing *Hopkins v. Lee*, 19 U.S. 109, 5 L.ed. 218 (1821).

definition. The Learned Court below, for reasons which we will examine in a moment, held it to be “provisional and not . . . final” (CT 161). The face of the decree itself would certainly strongly suggest finality, stating flatly “It is Ordered and Decreed that a *permanent injunction* be and is hereby entered, herewith, against defendant . . . *permanently* enjoining and restraining her” from doing any one of six prohibited acts (all of which she has in fact done). It is difficult to imagine language more final in tone or spirit than this.

The generally accepted definition of a Permanent Injunction may be found in 43 C.J.S., *Injunctions* § 3, p. 408:

“A perpetual or permanent injunction is one granted by the judgment which finally disposes of the injunction suit. It forms a part of the judgment in a hearing on the merits, and it can properly be ordered only on the final judgment. *Injunctions of this class are in no sense provisional remedies, but are always, and must be, final relief.*”

Accord, *Jackson v. Bunnell*, 13 N.Y. 216, 21 NE 79, 80 (1889); *Sheridan County Electric v. Ferguson*, 124 Mont. 543, 227 P(2d) 597 (1951); *Olsen v. Leith*, 71 Wyo. 316, 257 P(2d) 342 (1953).

Moreover, such a decree remains in force by its own nature. *NLRB v. Star Metal Mfg. Co.*, 187 F(2d) 856 (3 Cir. 1951).

There is no question that the old Federal test of finality was “the face of the judgment.” *Haseltine v.*

Central Bank of Springfield (No. 1), 183 U.S. 130, 22 S.Ct. 49 (1901); *Gulf Refining Co. v. United States*, 269 U.S. 125, 46 S.Ct. 52 (1925); and *Moore v. Cotton Exchange*, 270 U.S. 593, 46 S.Ct. 367 (1926).

If, by this test or by any other involving a reading of the entire record, it is clear that the Pennsylvania Equity Court, after setting a hearing date of which all parties had reasonable notice (X 4, RT 8), adjudicated all the averments of appellant's complaint and gave him by this decree every item of relief he sought (X 2, RT 6, CT 185, 186, 244, 245), why does the Court below decide that it is provisional?

Because it "was issued in aid of the jurisdiction of the Pennsylvania divorce court." (CT 161).

Appellant respectfully submits that, under the law, this reason is without merit.

On this subject, a present judge of the Third Circuit Court of Appeals and a nationally recognized authority on Marriage and Divorce, makes the following observations:

"The power of a court of equity to enjoin a person within its jurisdiction from prosecuting an action in the courts of another jurisdiction, is now a well recognized field of equity jurisprudence. The basis for the intervention of equity in such suits is usually said to be the suppression of vexatious litigation, the prevention of injustice by the furnishing of adequate relief, the avoidance of multiplicity of suits *and the protection of a jurisdiction already attached in a suit pending* or a judgment already entered.

"This power of equity is not novel. Indeed, injunction against proceedings at law was the very channel by which equity emerged as a distinct system of jurisprudence. It was because of the practice of the chancellor in granting injunctions against the institution of common law actions and the enforcement of common law judgments, that the historic struggle between equity and law reached its greatest height, a struggle which lasted for nearly two centuries until confirmed in favor of equity by a royal decree in 1616.

"The power of a court to enjoin proceedings in another court has been recognized by the Supreme Court of the United States and is a part of the federal law.³ It has been adopted in the Restatement of Conflict of Laws⁴; and it has for a long time been recognized in Pennsylvania."⁵

". . . This equitable remedy, by which oppressive, vexatious or unfair resort to a foreign tribunal is enjoined in equity, is of special value in divorce proceedings. In such cases, the exceptional requirement that resort to the courts be limited to the jurisdiction of the domicile, invites the proverbial frequent attempts at circumvention. This pressure has been so pronounced that in the face of it a small number of states have abandoned the generally strong social policy against divorce and opened their borders as a refuge for persons seeking an easy severance of their mar-

³Citing *Cole v. Cunningham*, 133 U.S. 107, 10 S.Ct. 269, 33 L.ed. 538 (1890) and other cases, particularly *Crosley Corp. v. Hazletine Corp.*, 122 F(2d) 925 (1941).

⁴§ 96. "A state can exercise through its courts jurisdiction to forbid a party, who is subject to its jurisdiction, to do an act in another state."

⁵Citing many cases going back to 1897.

riage ties. In these states, formal obeisance is rendered to requirements of domicile and jurisdiction and even of limited statutory grounds for divorce, but so loose is the practice and so certain the favorable decree, that the judgments of their courts are with good reason regarded by their sister states as the fruit of unfairness and untruth and to be credited with but the barest minimum of recognition. In view of this, equity jurisdiction in the prevention of such unjust or fraudulent divorce suits is of increasing importance. "The general jurisdiction of equity to enjoin divorce proceedings has now been firmly recognized in a growing number of states."

3 Freedman, *Marriage and Divorce in Pennsylvania*, § 804, pp. 1483-5 (2nd Ed. 1957).

Since basically, *every* injunction to restrain action in another state is "in protection of the jurisdiction" which issued it (as the foregoing analysis so succinctly reveals), does the Court below mean to suggest that *every* such injunction is provisional, and by its nature, *cannot* become permanent and final? Such an inference on our part is scarcely permissible, since it would involve the adoption of a novel principle of law at flat variance with the entire body of decided law on the subject.

Does the Court below, instead, regard merely *this* injunction to be "provisional" for reasons other than the foregoing one? If so, we search in vain for a single document, record or bit of testimony, or any stated reason arising therefrom, in support of the Court's conclusion in this regard. Against this void must be

placed not only the plain unambiguous language of the decree itself; the circumstances under which it issued pursuant to hearing (X 2, RT 6, CT 177, 217-245), its undeniable adjudication of the matters presented to the Pennsylvania chancellor for determination, and the categorical character of the relief granted (X 2, RT 6, CT 244, 245). To these we must add, in addition, the legal authorities defining a permanent decree.

Finally, however, we must note the authority of a line of Federal cases of appellate jurisdiction, whose ruling effectively precludes the Court below from inferences of its choice, supported or otherwise, as to the finality of this decree. The case of *Desjardins v. Desjardins*, 308 F(2d) 111 (6 Cir. 1962), which is typical, holds that where a decree of one state is the basis for action in the Federal Court of another (this case precisely), the Federal Court *is obliged to look to the law of the state entering the judgment to determine whether it is final*. Under this test, no further problem can exist: in Pennsylvania, this decree is final. See Pennsylvania cases cited *supra*, this Brief.

As such, then, it completely qualifies as a valid judgment under the Restatement, *Conflict of Laws*, § 429 rule and accordingly will be recognized, not merely as imposing a duty to obey it on the party against whom it was rendered, but “as determining . . . the status of the parties” (since that, too, was the purpose of the decree). See Restatement, *Conflict of Laws*, § 430, *supra*.

More specifically, under the unequivocal mandate of the Supreme Court of the United States in *Sutton v. Leib*, 342 U.S. 402, 72 S.Ct. 398 (1952) (a case which is, as will be shortly established, on all fours with the case at bar on all material facts), the Pennsylvania decree is entitled to Full Faith and Credit everywhere, in Nevada as well as Pennsylvania—even if this means that the Nevada decree must be stricken as void.

For this reason, it is respectfully submitted that the Learned Court below committed basic error when it first considered, passed upon, and accepted as valid the Nevada decree of divorce, as it were, *a priori*: i.e., without giving any previous consideration to the effect of Pennsylvania's decree on the Nevada proceedings, under the Full Faith and Credit clause and the doctrine of *res judicata*. The Court thus ignored the *caveat* contained in *Hanson v. Denckla*, 357 U.S. 235, 256, 78 S.Ct. 1228, 1241 (1957) that "the rule of primacy to the first final judgment is a necessary incident to the requirement of Full Faith and Credit."

Without such previous attention, the Court could (and did) find in appellee's favor on the only issue of fact present in the case: appellee's domicile between March 25 and May 7, 1964—a subsidiary issue which could only become of controlling importance if there was no Pennsylvania decree the validity of which as to Full Faith and Credit required prior determination.

However, as we have exhaustively established *supra*, we do have a valid final decree emanating from Penn-

sylvania with which both the Nevada state Court on July 6, 1964 and the Learned Court below on July 31, 1967 had to cope—*before* the Nevada divorce action could be considered on its merits. The problem now becomes, What issues are barred in Nevada as *res judicata* by the operation of the Full Faith and Credit clause?

The Court below based its attack on jurisdiction. Its rationale is that if appellee is *personally* subject to the jurisdiction of the Pennsylvania Court under the theory of the *Rothman* case, the decree is provisional; if she is not, then under the theory as it understands it of a recent Pennsylvania case⁶ (of which it gives no facts), no findings of a Pennsylvania Court as to subject matter would be binding on us here.

Since it has already been shown that appellee was indeed personally subject to the jurisdiction of Pennsylvania under the *Rothman* rule, and the decree entered against her was nevertheless a final valid judgment, we are forced to conclude (at the very least) the following: that she may not proceed with her Nevada divorce action personally; that she may not permit or cause her agents to do so; that she may do nothing but instruct her agents to discontinue said action (see Pennsylvania Decree of Permanent Injunction, clause (e) (X 2, RT 6, CT 12)). A Court properly extending Full Faith and Credit to this Decree would accordingly find appellee to be an incompetent witness in the subsequent cause brought

⁶*March Estate*, 426 Pa. 364, 231 A(2d) 168 (1967), which will be examined *infra*.

before it; and would most certainly suggest to her counsel that they discontinue the action on her behalf. As Officers of the Court, it may be presumed they would do so. In any event, no divorce would issue, and even if it did so, it would be void for lack of a competent record.

For these reasons, it is respectfully urged that a final decree binding appellee is dispositive of all issues in the case at bar and dictates the relief sought by appellant: (1) that Full Faith and Credit be afforded to the Pennsylvania decree, and that appellee be held to be bound thereby; and (2) that, as a consequence, the Nevada divorce decree be declared void, and her subsequent marriage as bigamous. Nevada holds bigamous marriages to be void. *Poupart v. District Court*, 34 Nev. 336, 123 Pac. 769 (1912).

But even if the foregoing were not so, it does not necessarily follow that the Nevada Court will acquire jurisdiction over the subject matter to grant a resultant divorce, because the Pennsylvania injunction cannot preclude it from doing so. Nevertheless, this is the position taken by the Court below in its opinion, relying for its authority on 24 Am.Jur.(2d), § 1010, p. 1152. Appellant is obliged to point out that examination of this section *supra* reveals a formidable *caveat* to the expressed rule on the very next page: 24 Am.Jur.(2d) § 1010, p. 1153:

“It would seem that if the defendant in the injunction suit, after commencing a divorce suit” (in another jurisdiction) “is served personally within the injunction state or appears in that ac-

tion, and the court determines that the defendant has not established a domicile in the divorce state, this determination of fact is *res judicata* in the divorce action."

For this proposition reference is made to another section (§ 972).

24 Am.Jur.(2d) § 1008, pp. 1149, 1150, clarifies the status of the law regarding service on the injunction defendant who has already subjected himself to the jurisdiction of the injunction Court by pointing out:

"Where a wife has sued for a separation and the court has jurisdiction in personam over the husband, and the wife files a motion for an injunction after the husband has gone to another jurisdiction to obtain a divorce, the notice of the motion may be served on the attorney for the husband; it is not necessary to serve the husband within the state on a motion for an injunction."

This section bases this comment on *Garvin v. Garvin*, 302 N.Y. 96, 96 NE(2d) 721 (1951). To this appellant adds, Accord: *Dorney v. Dorney*, *supra*; *Wenz v. Wenz*, *supra*; *Rothman v. Rothman*, *supra*; and *Bedient v. Bedient*, *supra*.

It is Am.Jur.(2d) § 972, p. 1109 which finally and irrevocably explodes the theory relied on by the Court below to retain for Nevada jurisdiction to grant a divorce in spite of the Pennsylvania injunction:

"So, too, where a court, on collateral attack, holds that a foreign divorce is void, the matter is *res judicata* between the same parties upon a second attack in another jurisdiction."

The authority for this principle is *Sutton v. Leib*, 342 U.S. 402, 72 S.Ct. 398 (1952). This famous case, one of the more recent of those Supreme Court decisions which have spelled out the implications of the *Williams v. North Carolina* rule, has elicited the following comment and analysis from Freedman:⁷

“The coincidence of jurisdiction with full faith and credit has come to affect the validity in the decree-granting state of a divorce not entitled to full faith and credit elsewhere. In the second *Williams* case and the *Esenwein* case the divorces were refused recognition because North Carolina and Pennsylvania, respectively, found that the alleged domicile in Nevada was not *bona fide*. But there was no implication in either case of the invalidity of the decree in Nevada. And so it was assumed that the recent decisions of the Supreme Court of the United States left unimpaired the validity of a divorce—and a subsequent remarriage—in the decree-granting state. The problem was decided by the Supreme Court of the United States in *Sutton v. Leib*.”

As briefly as possible, the facts were as follows: W obtained a divorce in Illinois with permanent alimony as long as she remained unmarried. She later married X in Nevada, he having gotten that day a divorce in an *ex parte* proceeding. Shortly thereafter, X's first wife, who still lived in New York and had neither been served nor appeared in Nevada, brought a separate maintenance proceeding in New York against X, who defended. This resulted in a decree in her favor de-

⁷³ Freedman, *Marriage and Divorce in Pennsylvania*, § 787, p. 1438 (2d Ed. 1957).

claring X's Nevada divorce "null and void." As soon as X was served in this suit, W ceased living with him, and shortly thereafter brought against X in New York an action for annulment of their marriage. Once again, X appeared and the annulment was granted on the ground that X had a wife living at the time of the marriage. W now claimed in Illinois that alimony from her first husband was not terminated by her marriage, because it had been annulled by the New York decree.

The District Court entered summary judgment for W's first husband and the Circuit Court of Appeals affirmed on the ground that X's divorce and hence his remarriage, were valid in Nevada. The Supreme Court reversed, stating at 408, 409 (allowing ourselves the liberty of substituting the above letters for names):

"W and X subjected themselves to the jurisdiction of the New York Court and its decree annulling their Nevada marriage was entered, so far as this record shows, of the parties and the subject matter. The burden is upon one attacking the validity of a judgment to demonstrate its invalidity.⁸ That judgment is *res judicata* between the parties and is unassailable collaterally.⁹ As both parties were before the New York court annulment of their Nevada marriage ceremony is effective to determine that the marriage relationship of W and X did not exist at the time of filing the present complaint (of W) in Illinois

⁸*Barber v. Barber*, 323 U.S. 77, 86; *Cook v. Cook*, 342 U.S. 126, 128.

⁹*Treimies v. Sunshine Mining Co.*, 308 U.S. 66, 76-78.

for unpaid alimony. The effect in Illinois of the New York declaration of nullity *on the obligation for alimony* is a matter of Illinois law hereinafter treated. The New York annulment determines the marriage relationship of W and X, just as any divorce judgment determines such relationship. If the Nevada court had had jurisdiction by personal service in the state or appearance in the case of X and his first wife, its decree of divorce would have been unassailable in other states.¹⁰ So as to the New York decree annulling the marriage, New York had such jurisdiction of the parties and *its decree is entitled to full faith throughout the Nation, in Nevada as well as Illinois*.¹¹

*"The New York invalidation of the Nevada decree of X and his first wife stands in the same position. As the first wife was neither personally served in Nevada nor entered an appearance, the Nevada divorce decree was subject to attack and nullification in New York for lack of jurisdiction over the parties in a contested action."*¹²

Since it was X who secured the *ex parte* Nevada divorce, and his first wife who attacked it collaterally with success in the state of her residence, by simple transposition of X into appellee, and first wife into appellant, the position of the instant parties as controlled by this decision is absolutely clear; and if we substitute for the double actions of separate main-

¹⁰*Sherrer v. Sherrer*, 334 U.S. 343.

¹¹*Treinies v. Sunshine Mining Co.*, *supra*; *Milliken v. Meyer*, 311 U.S. 457, 462.

¹²*Cook v. Cook*, *supra*; *Williams v. North Carolina*, 325 U.S. 226; *Rice v. Rice*, 336 U.S. 674.

tenance and annulment the equity action for an injunction, which inevitably will have the same effect, *Sutton v. Leib* (insofar as our issues alone are concerned) and the case at bar are on all fours.

It must be noted that in one respect at least the instant case is stronger for appellant than the *Sutton* case. In our case, appellant did not wait until the Nevada divorce had issued to do something; he proceeded with such vigor in his attack on the Nevada action that he secured not merely a valid judgment, but the *prior* judgment, and it is precisely this judgment that Nevada faced on July 6, 1964. This decree, says *Sutton*, "is entitled to full faith throughout the Nation, in Nevada as well as Illinois.": *Supra* at 409. The automatic result is that it operates as a bar to the Nevada action, which is accordingly void. This appellant specifically alleged in his Complaint in the Action for Declaratory Judgment.

Nor, appellant submits, can any meaningful distinction be drawn because in *Sutton*, the New York defendant not only appeared but fought, while in the instant case appellee did not actively contest.

First of all, the judgment of a Court of general jurisdiction carries a presumption of jurisdiction, and the burden of showing lack of jurisdiction is upon the party so asserting. If it (the judgment) "appears on its face to be a record of a Court of general jurisdiction, *such jurisdiction over the cause and the parties is to be presumed* unless disproved by extrinsic evidence, or by the record itself . . ." and the

burden of undermining the decree of the sister state "rests heavily upon the assailant." *Williams v. North Carolina*, 325 U.S. 226, 233-4, 65 S.Ct. 1092, 1097 (1945). See, also, *Com. ex rel. McVey v. McVey*, 383 Pa. 70, 118 A(2d) 144 (1955); *Com. ex rel. Spader v. Myers*, 187 Pa. Sup. 654, 145 A(2d) 870 (1958).

She was, moreover, in legal contemplation personally in the Court, and could have litigated any issue she chose. Where the proceedings involved (as they did in the Pennsylvania equity action) questions of jurisdiction over both person and subject matter, the accepted rule is that the following adjudication is *res judicata* on the question, since appellee had a full opportunity to litigate those issues. *Sherrer v. Sherrer*, 334 U.S. 343, 68 S.Ct. 1087 (1948); *Coe v. Coe*, 334 U.S. 378, 68 S.Ct. 1094 (1948); *Johnson v. Muhlberger*, 340 U.S. 581, 71 S.Ct. 474 (1951).

In *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134 (1938), Mr. Justice Reed, speaking for the Court, states (at 171, 172):

"Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction *over the parties and its subject matter*. . . ."

"Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is

no reason to expect that the second decision will be more satisfactory than the first. . . .”

In *Johnson v. Muhlberger, supra*, the defendant was served with process but did not appear either personally or by counsel; and his daughter, as his heir, was held barred on the basis of the rule *supra* from attacking the jurisdiction thus secured.

Freedman, commenting on this situation, concludes:¹³

“The doctrine of non-finality of the finding of jurisdiction has now lost its formerly absolute character, and its boundaries have been reduced. The old rule is left to operate only where the jurisdictional finding is *ex parte* and uncontested. For manifestly the rule derived from the Davis, Sherrer and Coe cases will not be held inoperative merely because the defendant who appeared did not specifically raise the question of jurisdiction.” (citing *Stoll v. Gottlieb, supra*) “And it should in reason be of no significance that a party who had the opportunity to contest jurisdiction failed to do so. To fail in such a case to raise the question of jurisdiction is to concede its existence.”

Once again, Pennsylvania law is in accord. *Harrison v. Harrison*, 183 Pa. Sup. 562, 133 A(2d) 870 (1957); *Collins v. Collins*, 175 Pa. Sup. 214, 103 A(2d) 494 (1954).

Since, further, under Pennsylvania practice, suits in equity conform to actions in assumpsit: Pa. R.C.P. § 1501: and in assumpsit actions, failure to answer an

¹³³ Freedman, *supra*, § 792, pp. 1456, 1457.

averment in the Complaint upon proper notice to plead thereto is an admission of the same: Pa. R.C.P. § 1029(b): it follows automatically that *appellant's undenied averments of appellee's Pennsylvania residence and domicile* in Paragraphs 3, 4, 7, 8 and 14 of his Pennsylvania Complaint seeking an injunction and carrying such notice (X 2, RT 6, CT 180-181, 185, 192) *are thereby admitted by appellee*.

The foregoing, appellant respectfully submits, is his view of the assertion of the Court below, based on 24 Am.Jur.(2d) § 1010, p. 1152, that even if the injunction were personally binding on appellee, it "cannot operate to preclude the Nevada divorce court from acquiring jurisdiction of the subject matter and granting a valid divorce." (CT 160).

The opinion of the court below admits that the Nevada court had no personal jurisdiction over appellant in the Nevada divorce action (CT 157). Since that same court was likewise barred, by *res judicata*, from finding that *appellee* was domiciled in Nevada, it is submitted that it becomes not merely difficult, but impossible, for Nevada to have granted a "valid" divorce, *since it had no jurisdiction over either party*. Under such circumstances, it has always been the law in this country that the court itself is without jurisdiction to affect the marriage status. *Bell v. Bell*, 181 U.S. 175, 21 S.Ct. 551 (1901) and many other cases; Restatement, *Conflict of Laws*, § 111; see, also, annotations in 105 A.L.R. 817 (1936).

In fact, even the physical presence of plaintiff and an appearance entered by the defendant in a court

barred, by the presence of some constitutional requirement not met (as here, Article IV, Section 1 and the resultant *res judicata*) from finding at least one of the parties to be domiciled therein, results in a decree which violates the Fourteenth Amendment as lacking in Due Process of Law. *Alton v. Alton*, 207 F(2d) 667 (3 Cir., 1953); *Granville-Smith v. Granville-Smith*, 214 F(2d) 820 (3 Cir., 1954).

Appellant respectfully urges, however, that the Learned Court below, in arriving at certain other basic findings of fact, drawing inferences therefrom, and arriving at certain conclusions of law, committed fundamental error. These will each be noted as briefly as circumstances permit.

A. Even in validating the Nevada decree by the factual finding that appellee was a *bona fide* domiciliary of Nevada after March 25, 1964, the opinion is illuminating, *since not one item of evidence is adduced in that opinion to support the finding.*

The testimony of appellee (on which that finding was necessarily based) however, was as follows: that she went to Nevada on March 24, 1964, on the advice of her Pennsylvania attorney (RT 12) for the purpose of securing a divorce (RT 12), her Pennsylvania attorney having previously arranged to have her represented by Nevada counsel (RT 12); that she put up at a motel (RT 11) under an alias she had never previously used (RT 12), because she didn't want her husband to know where she was (RT 16, 27), and commenced her Nevada action on May 7, 1964 (RT 13), the first day available to her under Nevada law;

that she spoke to her Pennsylvania counsel the first week she was in Reno (RT 22); that she knew she was involved in marital proceedings in Pennsylvania when she left (RT 12); and that George Sirott (her present alleged husband, who appellant had averred in a Pennsylvania pleading filed on February 26, 1964 to be her paramour and a wealthy man) (X 1, RT 6) had his business in Camden, New Jersey (RT 20), to which Riverton, New Jersey is "very close" (RT 20).

She was then confronted with four letters,¹⁴ all in her own handwriting (X 15-18, RT 13-15, 18, 19) all postmarked from either Camden or Riverton, New Jersey, the postmarked dates being, respectively, March 31, April 28, May 6, and May 6, 1964 (X 15-18). She admitted mailing the March 31, 1964 letter (RT 14), but claimed (after making the admission as to the first letter) that she mailed the balance to New Jersey. She admitted that on both the March 31 and April 28 letters she had written as the return address the one known to be her home in Pennsylvania (RT 20, 21), the same address she averred in commencing her Pennsylvania divorce action (X 1, RT 6). She then was questioned concerning depositions she had given only 5 days before trial, i.e., on July 26, 1967 (RT 26) in which she had testified she had written no letters during her stay in Reno prior to the divorce (RT 23) and during that time she did not use her Pennsylvania address on any letters (RT 24). She further testified that her children had remained with appellant after the parties separated (RT 29) and

¹⁴X 16 is an envelope only.

that she had prosecuted him for "stealing" her clothes at that home after the separation, in Pennsylvania (RT 29). She claimed friendly relations with her father, with whom appellant did *not* live (RT 27, 28) but he was the recipient of one of the May 6 letters postmarked Camden, New Jersey (X 18, RT 19). Inspection of this document reveals no reference to Reno (X 18). She married Sirott the same day she got her divorce (RT 30) at which ceremony her Nevada counsel were her witnesses (X 12, RT 13).

The foregoing represents the sum total of the evidence most favorable to appellee, her own testimony; yet it will be noted that the testimony surrounding the letters necessarily involved her in perjury.

On July 26, 1967 she had testified under oath that while in Reno prior to her divorce she had not only *not* used her Pennsylvania address on any letters, she had written no letters at all (RT 23, 24). It follows that if this statement is true, if she did not write these letters in Reno, she was not in Reno on March 31, April 28 and May 6, 1964. Since, however, Nevada law requires (as we know) *six weeks continuous physical residence within that state* before an action for divorce can be instituted, and all these dates are within this period, she felt obligated to testify that she was there. The statements being clearly contradictory, one of them must be a lie.

Appellant has always contended that appellee was then living at 1355 Overbrook Road, Montgomery County, Pennsylvania, and frequently commuted thence to Camden, New Jersey, the location of Sirott's

business (RT 20) (a distance of some 20 miles, as a map of the area will indicate). If this was so, then the presence of her return address in Pennsylvania on two envelopes, written in her own hand, and the postmarks from Camden and Riverton, New Jersey are easily explained—but in this event, she was not in Reno during this period.

Even without the letters, there is little doubt what a Pennsylvania Court would have held. In *Com. ex rel. McVey v. McVey, supra*, the Court reviews the facts therein (at 73-75):

“(Defendant) admitted that his primary reason for moving to Nevada was to obtain a divorce; on the very day of his arrival in Las Vegas he consulted an attorney whom he had previously retained for that purpose, and he started proceedings immediately after the required six weeks’ residence. While the motive that impelled him to seek the new domicile is not in any sense conclusive it does constitute an important factor to be taken into consideration in determining whether he really intended to make his home in Nevada. When he came to Las Vegas he took a room in a private dwelling; there he was joined by his former secretary, whom he married five days after his divorce was granted; the wife had claimed in the Florida divorce action that this secretary was the cause of their domestic difficulties.”

The recital of facts *supra* differs in three respects from the case at bar: (1) Appellee went to Reno, not Las Vegas; (2) she took a room in a motel, not a private dwelling; (3) she married the man claimed to

be the cause of the marital difficulties the same day the divorce was granted her, not five days later. Appellee can hardly claim these distinguish her case from the cited one in a manner favorable to her.

The *McVey* defendant also surrounded himself, *after the decree*, with various indicia of domicile: opened a bank account, had a phone listed in his own name, etc., and remained in Nevada for some time thereafter. The Court, remaining undeceived, held that he did not secure a *bona fide* divorce and explained:

“This was because the superficial indicia of domiciliary intent were outweighed in the total factual picture by the unavoidable inference that, *having gone to Nevada for the sole purpose of securing a divorce and marrying his former secretary*, (he) undertook to work there at casual and temporary jobs merely while marking what he considered *sufficient time to give color to his alleged acquisition of a bona fide domicile.*”

Since various aspects of the instant litigation have continued for over three years, and Sirott, never having relinquished control of his flourishing New Jersey operations, has ample means to do, he can afford additional time to continue to “give color” to such “domicile.”

A recent case emanating from the same Pennsylvania Court that issued the injunction in the case at bar has peculiar relevance to our inquiry at this point. In *Sirott v. Sirott*, 85 Montg. L.R. 228 (Pa. 1965), the husband, without instituting any prior action in Pennsylvania, commenced a Nevada action for divorce.

His wife, at the Pennsylvania domicile (who had never been served or appeared in the Nevada action), promptly secured an *ex parte* preliminary injunction to restrain him from proceeding with this action, sending him a notice of same (which he received) before he secured his decree of divorce in Nevada. At hearing on the injunction, the wife sought and obtained a ruling that her husband was in contempt, with the resultant issuance of a bench warrant. The husband, who had neither appeared nor answered at this hearing, then filed Preliminary Objections raising the question of jurisdiction. She filed an Answer thereto denying his claim of a new Nevada residence and domicile, but the husband did not support his allegations with any testimony.

Since the husband, as noted *supra*, had not submitted his marital status previously to this Court, he could only be subject personally to the Court's jurisdiction if still a resident of Pennsylvania; and the Court accordingly directed its attention exclusively to this problem (at p. 230):

"The cases require that the court make a determination that the defendant is a domiciliary of Pennsylvania: *Wallace v. Wallace*, 371 Pa. 404 (1952); *Smith v. Smith*, 364 Pa. 1 (1950). It is the court's conclusion that defendant has not effectually terminated his residence in Montgomery County, Pennsylvania. He is therefore subject to the jurisdiction of this court for the purposes of this action. The words of Justice Drew in *Smith v. Smith*, *supra*, at page four, are applicable here: 'It is not disputed that defendant was for some years a Pennsylvania domiciliary. *That domicile*

having been shown to exist, it is presumed to continue until another domicile is affirmatively proven. Pusey's Estate, 321 Pa. 248, 184 A. 844; Price v. Price, 156 Pa. 617, 27 A. 291. The burden is on the one alleging a change of domicile to prove residence in a new locality and the intention to make that his permanent home: Barclay's Estate, 259 Pa. 401, 404, 103 A. 274; Chidester v. Chidester, 163 Pa. Sup. 194, 196, 60 A(2d) 574; Reimer v. Reimer, 160 Pa. Sup. 509, 513, 52 A(2d) 357; Alburger v. Alburger, 138 Pa. Sup. 339, 10 A(2d) 888.'"

We note at once that the principles invoked by the Court are such a basic part of Pennsylvania law and so amply supported by decisions, that *only one* of the cases cited by appellant in support of the same propositions is cited by the Court, which also relies on many others.

Appellant suggests that a finding in the case at bar of Nevada domicile on such evidence is grossly against the weight of the same, and is of the type that provoked one Court, after reviewing similar evidence, to speculate that (at p. 442):

"the therapeutic properties of the climate of our sister Commonwealth are marvelously stimulative to credulity . . ."

Meng v. Meng, 47 D. & C. 429 (Pa. 1943).

B. Appellant is obliged to take vehement exception to two glaring misstatements of fact contained in the opinion of the Learned Court below because, although doubtless inadvertent, they give rise to inferences drawn by the Court concerning appellant's good faith

in the conduct of all aspects of this involved litigation; and those inferences cannot but be calculated to place him in the worst possible light before your Honorable Court.

1. After noting that appellee instituted her divorce action in Pennsylvania on December 19, 1963, the Court then states that he "filed an Answer on May 1, 1964" (CT 158). The clear implication is that nothing else happened in between, and that appellant did not bestir himself for $4\frac{1}{2}$ months until, on the very eve of his wife's institution of Nevada proceedings (and perhaps because he suspected this might occur) he then filed an Answer.

The record discloses, however (X 1, RT 6, CT 263, 264), that he filed an appearance and Warrant of Attorney on January 9, 1964; ruled his wife for a Bill of Particulars on that same date; on February 26, 1964, two days after his wife petitioned for alimony, filed an Answer to the same averring Sirott to be her paramour; filed a Notice of intention to take her Depositions on April 2, 1964, and when confronted by her Motion for Protective Order, filed an Answer thereto on April 17, 1964. Counsel actually appeared in Court in connection with these motions on March 6, April 17, and May 1, 1964.

This is hardly the picture one visualizes in the opinion, but the Learned Court below feels it appropriate to comment:

"Hindsight persuades us that if (appellant) had accelerated the Pennsylvania divorce action to trial and final decision with vigor equal to that

used in bombarding appellee, her attorneys, the Attorney General of Nevada, and four Nevada District Judges with injunctive orders, he might have accomplished his objective of retaining an estranged wife within the matrimonial web."

Sight of the more ordinary type may lead others to conclude, however, that he had instituted a most active defense, and if the Pennsylvania matter presently languishes, it is because appellee (who is the plaintiff) has, under present circumstances, no urgent desire to proceed, certainly not to have her depositions taken.

It is unfortunate that said Court below felt itself obliged to re-echo, in almost the same words (X 3, RT 7, CT 43, 161), the sentiments of the Nevada state Court granting the divorce on July 6, 1964 when alluding to the receipt by it of the Permanent Decree of Injunction from Pennsylvania. Those sentiments were, no doubt, the product of righteous indignation at what it regarded as unwarranted interference with the performance of its duties. Under the facts of this case, however, they may also be viewed as mere pique at receipt of documents erecting an impregnable constitutional bar to a proceeding, which the Court fully intended to, and did, ignore in carrying its own case to conclusion. It could not have been the tone of the letters conveying the notice and Decree of Injunction which aroused the ire of the Court; this was respectful and not in the least peremptory, as the record indicates (X 2, RT 6, CT 231, 232); it could only have been receipt of the Decree itself which was so objectionable.

2. Appellant feels obliged to point to another statement contained in the opinion of the Learned Court below. On July 5, 1967, that Court dismissed appellee's Motion for Summary Judgment in an opinion in which it stated (CT 106): "In neither the Nevada divorce action *nor the Pennsylvania injunction action, however, did the Court have or claim personal jurisdiction over both parties.*" This observation is repeated in the opinion under review, and precedes the statement that Pennsylvania's claim to jurisdiction over both parties and subject matter first came to its "attention on July 10, 1967." (CT 159).

In view of the averments contained in Paragraphs 3, 4, 7, 8 and 14 of appellant's Complaint in Equity filed in Pennsylvania on May 20, 1964, exemplified copies of which have been of record in the case at bar virtually from its inception (X 2, RT 6, CT 173), all of which categorically aver just such jurisdictional claims; and the Complaint in the Action for Declaratory Judgment itself, filed May 26, 1966 with the Court below (CT 2-7), in which not only appellant but also the Pennsylvania Court claimed such jurisdiction in Paragraphs VIII, IX, XIII(e), XIV, XVI, XVIII, XX, and XXI, appellant can express only the most complete puzzlement as to the origin of the Court's impression.

C. The Learned Court below admits, albeit "reluctantly," as he puts it (CT 159), Pennsylvania's jurisdiction over appellee's person in this Injunction suit, under the authority of the *Rothman* case, *supra*. This reluctance stems, we are told (CT 160), from the

language of a letter sent by appellant's attorney to appellee's Pennsylvania divorce attorney giving notice of the final hearing (CT 160), which the Court construes as a tacit admission of appellant's belief that such service would be ineffective, the *Rothman* case not having been decided until almost three years later.

It is respectfully submitted that this construction is patently faulty, for three reasons: (1) the *Rothman* case was itself based on *Wenz v. Wenz*, *supra*, decided four years before the service in question and certainly not unfamiliar to appellant; (2) If appellant's counsel had not deemed that service valid, he would not have made it—and it was the most important service of all, since it is the only one the Court below recognized (CT 159); and (3) The language of the letter referred to could lead with equal force to the correct and true inference: that appellant's counsel recognized that appellee's local Pennsylvania lawyer was engaged in a legal maneuver that (as he thought) might yield appellee some tactical advantage.

D. We must now give careful consideration to the Pennsylvania case of *March Estate*, relied upon so heavily by the Learned Court below to establish that, apparently, the Pennsylvania Court did not, in this injunction action, pass on the question of a Nevada domicile and that, accordingly, that finding is not *res judicata* in Nevada (which can then find appellee to be a Nevada domiciliary and secure jurisdiction). The Court below claims for the facts of the *March Estate* case a "four-squariness" with those of the case at bar amounting to "an almost incredible coincidence." (CT 161).

In *March Estate*, 426 Pa. 364, 231 A(2d) 168 (1967), those facts are as follows:

March had seven children by a first marriage who are his sole legatees. He married for a second time in 1955, husband and wife separating in 1956. He started a divorce action in York County, Pennsylvania, at that time, which he never subsequently pursued. He and his wife never lived together following the 1956 separation.

In February, 1962, March gave up his home in Pennsylvania; in March, 1962, he voluntarily surrendered his real estate broker's license, and in April, 1962, he went to Nevada. On June 1, he commenced a divorce action there; and on June 11, 1962 his wife sought, and secured, a *preliminary injunction* in York County. This, of course, was not served on March himself, service being made on an attorney "who had previously been employed at various times by March"; March himself received a notice of this injunction in Nevada. *The opinion discloses no further progress in this injunction action.* His wife had neither been served nor appeared in the Nevada action.

March got his Nevada decree on June 29, 1962 and continued to reside in Nevada until April, 1963, after which he "lived in various other states, including Florida and Arkansas" (at p. 367). Apparently elderly or in ill health, he resided in Orlando, Florida and Hot Springs, Arkansas. He returned to Pennsylvania "on two occasions" for "very short periods of time" (at p. 367) prior to his ultimate return to a nursing home in York County, where he died in November, 1965.

The second sentence of the opinion of the Pennsylvania Supreme Court, on review, states: “*The sole issue on appeal* is whether the Court below was correct in holding that the Full Faith and Credit Clause of the Federal Constitution, Article IV, § 1, did not require it to honor this Nevada divorce decree.” (at p. 365).

After reviewing the foregoing facts, it carefully distinguishes *Com. ex rel. Esenwein v. Esenwein*, 348 Pa. 455, 35 A(2d) 335 (1944) and *Com. ex rel. McVey v. McVey*, *supra*, on the ground that in the former, the record disclosed the party securing the decree left the state immediately thereafter (at p. 369) and in the latter, that it disclosed he went to Nevada to secure a divorce and marry his secretary (at p. 370). The Court accordingly, and appellant submits, correctly, finds the Nevada decree valid and entitled to Full Faith and Credit.

Appellant also submits there is absolutely nothing to be found in this opinion, either as to facts or law, which disturbs, limits or qualifies any of the massive body of case law and authorities hereinabove set forth that would serve to nullify the full legal impact of the Rapoport Permanent Decree in the case at bar.

Of course, the “sole issue” the appellant could raise, in the *March* case, was the validity of the Nevada divorce decree: *there was no other valid final decree present in the case*.

And, as appellant has had occasion to note, almost at the outset (This brief, pp. 13, 14), under the uniformly accepted view of the law set forth in the Re-

statement, *Conflict of Laws*, § 429(a), only a decree entered “after reasonable notice and an opportunity to be heard has been given to all persons to be bound” is entitled to recognition in other states (*Restatement, Conflict of Laws*, § 430). A preliminary injunction issued on an *ex parte* affidavit, without hearing, simply does not qualify; but that is all the *March* appellee had.

Moreover, the opinion *does not even disclose that the attorney notified* of the entry of the Preliminary Injunction, presumably on March’s behalf, *was his attorney of record in the six-year-old divorce case instituted in 1956*. Under these circumstances, the “service” was gratuitous, since it did not even serve the purpose of notifying someone in authority in the other state of the pending proceedings. This at least the notifications to the Courts, in the case at bar, accomplished.

What appellant submits is the basic error of confusing the *March* situation with the instant facts may arise out of unfamiliarity with Pennsylvania procedure in these cases.

Freedman describes the process as follows:¹⁵

“(Plaintiff files his) complaint in equity and on *ex parte* affidavits obtains a temporary injunction pending a hearing. The court customarily directs supplemental service by registered mail of a copy of the complaint, the temporary injunction and the order directing such service, on the defendant in the foreign state and on (her) attorneys who represent (her) there. The regular

¹⁵Freedman, *supra*, § 805, p. 1490.

service is also made, pursuant to the plaintiff's view of the (wife's) residence, by leaving it at the address which plaintiff claims is still the defendant's residence in Pennsylvania. Such service having been made, and the defendant not appearing, it will ordinarily follow that an injunction ultimately will issue in final form."

Three things in the foregoing description will be noted at once: (1) It does not visualize the existence of a current Pennsylvania action for divorce, since no mention is made of service on local divorce counsel. It is assumed that defendant has left the state without subjecting herself previously to the jurisdiction over the subject matter; (2) The preliminary injunction is merely temporary, pending a hearing; (3) After notice as described *supra*, and after hearing, *even if defendant does not appear*, a permanent injunction issues.

The instant injunction is final; the *March* was temporary.

But (the Court below may have reasoned), the *Rothman* rationale (and *Wenz*) claims Pennsylvania jurisdiction without service; why was *March* not similarly subject to Pennsylvania's jurisdiction? He had, after all, commenced (even if he did not pursue) a divorce action there six years before.

The answer, appellant suggests, lies in the specific language of both the *Wenz* and *Rothman* decisions. As actually set forth in the opinion of the Court below (CT 160), it is based on the thrust of the following reasoning: *where it is clear to the Court that one*

party, already before it on the same subject matter, *is contumaciously attempting to circumvent and subvert its authority and jurisdiction*, it will act to thwart that undertaking.

Can any reasonable person, under the facts of the *March* case, find it clear that March actually went to Nevada *in order to subvert and circumvent* the authority of the Pennsylvania Court where he had started, and abandoned, a divorce action *six years before*, an action which was truly dormant? Appellant flatly rejects such a notion, and so, he submits, would any Pennsylvania Court. But that question was never reached in the *March* case, because only a temporary injunction was involved.

It is for this reason that the Supreme Court of Pennsylvania (to the apparent surprise of the Court below) did not discuss the *Rothman* case, which it had decided only 57 days before: the issues were different, and different principles of law applied.

Accordingly, the "incredible coincidence" which the Learned Court below finds between a six-year-old dormant divorce and *one in which the parties were in another Court six days before*, presents an analogy so strange as to border on the grotesque.

E. Moreover, the critical inferences which it draws from the failure of the Pennsylvania Court to make findings of fact, and the use it makes of them (CT 160, 161, 162):

"We have observed that the Pennsylvania equity courts made no findings of fact. None were required as a predicate for the injunction because,

under the *Rothman* case, the basis for the injunction was the pendency of the Pennsylvania divorce case. . . . For the Pennsylvania divorce court to have had continuing jurisdiction over the marital res, it need have found only that one of the spouses, Irvin Rapoport, was a bona fide domiciliary of Pennsylvania. . . . Thus, the bona fides of *Rose Rapoport's Nevada domicile was not necessarily involved* in the determination to issue the injunction *and a finding on that issue by the Pennsylvania equity court is not necessarily implied*. . . . We conclude that the Pennsylvania Courts have never adjudicated the bona fides of Rose Rapoport's Nevada domicile and that" (we are entitled to make) "the finding we have made sustaining her Nevada domicile in support of the Nevada divorce decree . . ."

: are categorically not permissible under the law. That law, unchallengeably, is that of Pennsylvania. The Court has drawn these inferences not to sustain, but to destroy, Pennsylvania's jurisdiction in a case where that Court found, *without any opposing testimony from appellee*, that it had jurisdiction, and that it had such jurisdiction *over both parties and subject matter*. These inferences thus fly squarely in the face of the mandate concerning *presumption of jurisdiction* contained in the second *Williams* case (*supra*, this Brief). It also flies in the face of Pennsylvania law.

When considering the extension of Full Faith and Credit to a decree of a sister state, *the Court is not permitted to examine into the reasons which moved the Court issuing the decree to rule as it did*. *In re Higbee's Estate*, 372 Pa. 233, 93 A(2d) 467 (1953).

F. One final observation: The Court below has noted, correctly, that real estate in Pennsylvania—the marital domicile which is the home of appellant and his children—will be affected. It will, in fact, be subject to partition and sold. For this additional reason, appellant contends, the validation of this void Nevada decree constitutes a violation of the Fourteenth Amendment, in that it will deprive him of property without Due Process of Law.

That appellee (although she admitted she knew these facts) brought neither the existing Pennsylvania divorce action nor her activities up to May 1, 1964 therewith, to the attention of the Nevada Court, is beyond question. Proof that the Nevada state Court, its clerk, her attorney (as in all states, an officer of the Court) and she herself, had knowledge of the Pennsylvania Injunction of June 24, 1964 when she entered the Reno Court on July 6, 1964, is not only beyond question, but overwhelming.

CONCLUSION

For all of these foregoing reasons: that the Pennsylvania decree was a valid final judgment, and as such, was entitled to Full Faith and Credit under Article IV, § 1 of the Constitution of the United States; that, moreover, it was the *prior* valid judgment, and thus served as a bar to any Nevada proceedings on the same subject matter as *res judicata*; that the subsequent Nevada decree was void for lack of jurisdiction, and its entry a violation of the Due

Process clause of the Fourteenth Amendment; that this case is controlled by the principle of *Sutton v. Leib*, the Pennsylvania decree being valid everywhere in the United States; and that the *March Estate* case is readily distinguishable: for all of these reasons, appellant respectfully submits, your Honorable Court should reverse the judgment of the Court below, declare the Pennsylvania decree to be valid, and the Nevada Decree of Divorce (and the subsequent alleged marriage based thereon), null and void.

Dated, San Francisco, California,
January 8, 1968.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

SHELDON W. FARBER,
Attorney for Appellant.

(Appendix Follows)

Appendix

Appendix

LIST OF EXHIBITS

No.	Identified	Offered	Received or Rejected
1. Exemplified Pleadings, Pennsylvania Divorce Action	6	6	6
2. Exemplified Pleadings, Pennsylvania Injunction Action	6	6	6
3. Divorce Records, Nevada divorce	7	7	7
4. Sealed Envelopes and Open En- velopes with Contents and Re- turn Receipts	7, 8	8	8
5. Letter dated 10-29-64	13	13	13
6. Letter dated 7-21-64	13	13	13
7. Note in the amount of \$1466.67	13	13	13
8. Stock	13	13	13
9. Bank Book for Mrs. Joan Rose Sirott	13	13	13
10. Bank Statement	13	13	13
11. Bank Book for George or Joan Sirott	13	13	13
12. Certificate of Marriage	13	13	13
13. Lease Agreement	13	13	13
14. Bank Statement	13	13	13
15. Envelope and Contents postmarked 3-31-64	13, 14	14	14
16. Envelope postmarked 4-28-64	15	16	16
17. Letter and Envelope postmarked 5-6-64	18	19	19
18. Letter and Envelope postmarked 5-6-64	19	20	20

No. 22,415

United States Court of Appeals
For the Ninth Circuit

IRVIN RAPOPORT,

Appellant,

vs.

ROSE RAPOPORT, also known as Joan
Sirott,

Appellee.

Appeal from the United States District Court
For the District of Nevada

APPELLEE'S BRIEF

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No. 22,415

United States Court of Appeals For the Ninth Circuit

IRVIN RAPOPORT,

Appellant,

vs.

ROSE RAPOPORT, also known as Joan
Sirott,

Appellee.

**Appeal from the United States District Court
for the District of Nevada**

APPELLEE'S BRIEF

STATEMENT OF THE PLEADINGS

This is an appeal¹ from a judgment entered on August 23, 1967 by the United States District Court for the District of Nevada.² The judgment was rendered in an Action for Declaratory Judgment filed in the United States District Court for the District of Nevada on May 26, 1966.³

¹The record on appeal herein consists of two volumes, plus exhibits. Volume 1 contains the Clerk's Record on appeal and is numbered pages 1 to 305. Volume 2 contains the Reporter's Transcript of proceedings numbered pages 2 to 36. *All citations of the record herein are to Volume 1 and follow the form Record p.*

²Record pp. 163-164.

³Record pp. 2-10.

Jurisdiction of the District Court was based upon diversity of citizenship and the amount in controversy.⁴

Notice of Appeal was filed on September 18, 1967.⁵ This was within the period provided by statute for appeal to a Court of Appeals.⁶

STATEMENT OF THE CASE

Appellee, Joan Sirott ("Mrs. Sirott"), after fulfilling the domiciliary requirements of Nevada, instituted divorce proceedings on May 7, 1964 against her then husband, Appellant, Irvin Rapoport ("Mr. Rapoport"), in the Second Judicial District Court of Washoe County, Nevada.⁷

Mr. Rapoport was admittedly fully aware of the pendency of the Nevada divorce proceedings.⁸ However, he chose to ignore them, contenting himself merely with obtaining from the Court of Common Pleas of Montgomery County, Pennsylvania, an *ex parte* preliminary, and later an *ex parte* permanent, injunction purporting to restrain Mrs. Sirott, *inter alia*, from proceeding with the Nevada action.⁹

Mr. Rapoport did not appear, specially or otherwise, in the Nevada action.¹⁰

⁴Record pp. 2-10, 156.

⁵Record p. 170.

⁶28 USC § 2107.

⁷Record pp. 29-31.

⁸Record pp. 57, 58, 133.

⁹Record pp. 194-196, 244-246.

¹⁰Record pp. 8, 44.

He did not assert in the Nevada action any of the "defenses" which he now attempts to assert.

He did nothing with respect to the Nevada action except mail to the Clerk of Washoe County Court, Nevada, the Attorney General of Nevada, and all the Judges of Washoe County, copies of the Pennsylvania injunctions.¹¹

On July 6, 1964, the Nevada court, after hearing, entered a divorce decree in favor of Mrs. Sirott and against Mr. Rapoport.¹² Mr. Rapoport filed no appeal.

Following the divorce decree Mrs. Sirott married a Nevada businessman, George Sirott, and lived with him continually in Nevada from July 1964 to the present time.¹³

After almost two years of inaction following the Nevada divorce decree, Mr. Rapoport instituted in 1966 the present Action for Declaratory Judgment seeking to have the Nevada divorce decree declared "null and void and of no force and effect."¹⁴

On August 23, 1967, following trial, the United States District Court, through Bruce R. Thompson, District Judge, entered judgment declaring valid the Nevada divorce decree.¹⁵

This appeal followed.

¹¹Appellant's Brief p. 4.

¹²Record pp. 35-36.

¹³Record p. 16.

¹⁴Record p. 8.

¹⁵Record pp. 163-164.

STATEMENT OF THE ARGUMENT

It is difficult to determine if Mr. Rapoport is seriously attacking the findings of *both* the Nevada court and the court below that Mrs. Sirott was domiciled in Nevada at the time of her divorce.

However, it is perfectly clear Mr. Rapoport *is* seriously contending that, even if Mrs. Sirott was domiciled in Nevada, somehow or other the Nevada court could not exercise jurisdiction over her and her divorce because of the existence of the Pennsylvania injunction.

As will be shown, Mr. Rapoport is foreclosed in these proceedings from claiming that the Pennsylvania injunction had any effect on the Nevada proceedings.

Regardless of the effect of the injunction, though, the first issue in this appeal is whether the court below was *clearly erroneous* in finding that Mr. Rapoport did not sustain the burden of proof of overcoming the presumption of domicile and jurisdiction established by the Nevada decree.

I.

MR. RAPOPORT DID NOT SUSTAIN THE BURDEN OF PROOF OF OVERCOMING THE PRESUMPTION OF DOMICILE AND JURISDICTION ESTABLISHED BY THE NEVADA DECREE

The full faith and credit clause of the Constitution requires that *prima facie* validity be accorded the Nevada divorce decree and the burden rests heavily upon the litigant who would escape the operation of the decree by assailing its validity.

Rice v. Rice, 336 U.S. 674, 69 Sup. Ct. 751 (1949);
Williams v. State of North Carolina, 325 U.S. 226,
 65 Sup. Ct. 1092 (1945);

Esenwein v. Commonwealth of Pennsylvania, 325 U.S. 279, 65 Sup. Ct. 1118 (1945).

Since the touchstone of jurisdiction in divorce is that the plaintiff must be domiciled in the divorce-granting state, the burden of proof is upon Mr. Rapoport to overcome the presumption of domicile established by the Nevada decree.

Williams v. State of North Carolina, 317 U.S. 287, 63 Sup. Ct. 207 (1942).

Significantly enough, Mr. Rapoport unequivocally acknowledges that "shortly after July 6, 1964," Mrs. Sirott became, and still is, a citizen and resident of the State of Nevada.¹⁶ Such a broad and unsolicited concession is indeed noteworthy since diversity of citizenship for purposes of maintaining the instant action was necessary *only as of May 26, 1966 when this action was instituted*.

What greater evidentiary proof is there of the fulfillment of the domiciliary requirement on July 6, 1964, than the admission by Mr. Rapoport of what took place "shortly after July 6, 1964"? It is difficult, if not impossible, to understand the gymnastics Mr. Rapoport engages in to contend that his former wife was not "shortly before" what she admittedly was "shortly after".

How more vividly could Mrs. Sirott exemplify her domiciliary connection with Nevada at the time of her divorce and shortly prior thereto than by the fact that:

- (1) She came to Nevada with the intention of making Nevada her home for an indefinite period;¹⁷

¹⁶Record p. 2.

¹⁷Record p. 40.

- (2) Immediately following her divorce on July 6, 1964 she remarried in Nevada;¹⁸ and
- (3) Thereafter, with her new husband, she lived uninterruptedly in Nevada down to the present time.¹⁹

It is also quite impressive that, in the three years which elapsed between the commencement of the Nevada action and the trial in the instant proceeding, the only shred of "evidence" uncovered by Mr. Rapoport to negate the presumption of validity of the Nevada decree consisted of a few letters sent by Mrs. Sirott, shortly *before* commencing divorce proceedings, from Reno, Nevada, to an address in Camden, New Jersey, for remailing to members of her family!

Little wonder it is that, on such flimsy evidence, Mr. Rapoport was reluctant to contest the issue of domicile before the Nevada court or that the court below was disinclined to conclude that Mr. Rapoport had sustained the burden of showing that Mrs. Sirott was not a bona fide domiciliary of Nevada at the time of her divorce proceeding.

The case of *March Estate*, 426 Pa. 364, 231 A.2d 168 (1967) is, as the court below said,²⁰ by "an almost incredible coincidence" on all fours with the case at bar. If Pennsylvania under the facts of *March Estate* upheld the validity of that Nevada decree, there is little doubt what its attitude would be with respect to the instant decree

¹⁸Record p. 16.

¹⁹Record p. 16.

²⁰Record p. 161.

and no doubt whatsoever as to why Judge Thompson reached the conclusion he did.

Rule 52(a) of the Federal Rules of Civil Procedure requires that on appeal, "Findings of fact shall not be set aside unless clearly erroneous"

"The burden placed on an appellant, who seeks to reverse a judgment for error in fact, to show that essential findings are clearly erroneous, is, indeed, a heavy one"

Hedger v. Reynolds, 216 F.2d 202, 203 (2nd Cir. 1954).

It is submitted that, in view of the failure of Mr. Rapoport to sustain the burden of proof required of him, Judge Thompson's finding that Mrs. Sirott was domiciled in Nevada at the critical time was not so "clearly erroneous" as to warrant reversal.

II.

MRS. SIROTT BEING A NEVADA DOMICILIARY, THE NEVADA COURT HAD JURISDICTION OVER THE DIVORCE PROCEEDINGS AND, THEREFORE, IT IS THE NEVADA DIVORCE DECREE OF JULY 6, 1964 WHICH IS ENTITLED TO FULL FAITH AND CREDIT

The celebrated case of *Williams v. State of North Carolina*, 317 U.S. 287, 63 Sup. Ct. 207 (1942) held that a divorce decree is entitled to compulsory recognition in other states if the plaintiff was domiciled in the divorce-granting state, *even though* the decree was obtained without personal service of process in the state and without appearance in the action by the defendant.

The second *Williams* case, *Williams v. State of North Carolina*, 325 U.S. 226, 65 Sup. Ct. 1092 (1945), reiterated the rule of law established in the first *Williams* case in the following language:

“All the world is not a party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States” 325 U.S. at 232, 65 Sup. Ct. at 1096.

Despite the foregoing explicit determination by the Supreme Court of the United States, Mr. Rapoport nevertheless appears to contend that, even if Mrs. Sirott was domiciled in Nevada, the Nevada court was somehow or other precluded from exercising jurisdiction over her divorce because of the Pennsylvania injunction. He seems to be saying that, *even though he completely refrained from entering the Nevada judicial forum*, the full faith and credit—*res judicata* doctrine dictates that the Nevada court was incapable of entering a valid divorce decree, and, therefore, *on its own initiative* should have refused to exercise its jurisdiction over Mrs. Sirott’s divorce.

The fundamental flaw in Mr. Rapoport’s argument is that the law is against him.

Since at least 1939 the Supreme Court of the United States has repeatedly held that failure by a state with jurisdiction (in this case Nevada) to give full faith and credit to the decree of another state (in this case Pennsylvania) is at the very most an error—nothing more. It may even be “basic error” as Mr. Rapoport uses the term, *but it is not a jurisdictional defect*.

Moreover, if the action of the second state is erroneous for any reason whatsoever, including the failure to give proper deference to a prior decree in a sister state, the *only* remedy is an appeal to the highest court of the second state and, thereafter, from the appellate decision of the second state to the federal court.

Failure to initially interpose in the state court the defense of full faith and credit—*res judicata*, or any other defense, or to appeal from an allegedly erroneous judicial interpretation by the lower state court, constitutes an unqualified waiver.

Consequently, so long as Nevada had jurisdiction in July 1964, it is the Nevada decree of divorce which is entitled to full faith and credit,²¹ and the “defenses” asserted now by Mr. Rapoport for the first time are of naught.

Morris v. Jones, 329 U.S. 545, 67 Sup. Ct. 451 (1947),

Williams v. State of North Carolina, 325 U.S. 226, 65 Sup. Ct. 1092 (1945),

Williams v. State of North Carolina, 317 U.S. 287, 63 Sup. Ct. 207 (1942),

Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 Sup. Ct. 44 (1939),

Southard v. Southard, 305 F.2d 730 (2d Cir. 1962),

See also *Roche v. McDonald*, 275 U.S. 449, 48 Sup. Ct. 142 (1928).

In *Treinies* there was a Washington court determination that certain property belonged to A, Washington

²¹The entitlement of full faith and credit of the Nevada decree applies not only to state courts but also to federal courts. 50 CJS, Judgments, § 900, p. 519, and cases cited therein.

determining that it had exclusive jurisdiction. Subsequently, an Idaho court held that the property belonged to B. The Washington judgment was rejected, the Idaho court deciding among other things that Washington did not have exclusive jurisdiction. After the case came up again in Washington the Supreme Court of the United States held that Washington was bound to award the property to B on the basis of the full faith and credit—*res judicata* effect of the Idaho decision. Since the Idaho court did have jurisdiction, its determination of the ownership of the property was conclusive regardless of whether its rejection of the earlier Washington judgment, albeit based upon exclusive jurisdiction, had been proper or had involved a denial of full faith and credit to that judgment.

In *Morris* a stay order had been issued by an Illinois court. The petitioner had notice of the stay order but nevertheless continued to prosecute his suit in Missouri and thereafter obtained a judgment in Missouri. Petitioner then filed an exemplified copy of the judgment in Missouri as proof of claim in the Illinois proceeding. An order disallowing the claim was sustained by the Illinois Supreme Court against the contention that its allowance of the claim was required by the full faith and credit clause. On appeal to the Supreme Court of the United States the decision of the Illinois Supreme Court was reversed. Said the Supreme Court of the United States:

“As to respondent’s contention that the Illinois decree, of which petitioner had notice, should have been given full faith and credit by the Missouri court, only a word need be said. *Roche v. McDonald*, . . . makes

plain that the place to raise that defense was in the Missouri proceedings. And see *Treinies v. Sunshine Mining Co.* And whatever might have been the ruling on the question, the rights of the parties could have been preserved by a resort to this Court which is the final arbiter of questions arising under the Full Faith and Credit Clause. *Williams v. State of North Carolina* In any event the Missouri judgment is *res judicata* as to the nature and amount of petitioner's claim as against all defenses which could have been raised." 329 U.S. at 552; 67 Sup. Ct. at 456.

In *Southard* the appellant had obtained a Nevada divorce. Thereafter the appellee commenced her own action for divorce in Connecticut. The appellant entered an appearance in the Connecticut action setting up the Nevada decree by way of defense. The Connecticut court found against the appellant and entered a divorce decree in favor of appellee. Appellant did not file an appeal in Connecticut but instituted an action in the United States District Court for the Southern District of New York in which he asked that the divorce decree be held invalid because the state court had not accorded full faith and credit to the Nevada decree. The District Court dismissed the action. In affirming the decision of the District Court the Court of Appeals for the Second Circuit said:

"The substantive defense that the Connecticut divorce was barred by the requirement that that state give full faith and credit to the Nevada decree was one that could have been and indeed apparently was raised in the Connecticut court. Whether that court actually passed upon the defense or not, principles of *res judicata* forbid us to consider it. The appel-

lant's opportunity to attack the Connecticut decree on the merits died with his failure to appeal" 305 F.2d at 732.

The law as proclaimed by the Supreme Court of the United States has been enunciated in the Restatement of Judgments.

Section 42 provides:

"Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling in a third action between the parties."

Comment a. to the foregoing Section 42 explains the Rule in the following language:

"a. As is stated elsewhere . . . , if a prior judgment is not relied upon in a second action in which it would be conclusive, the judgment in the second action is valid although it is inconsistent with the judgment in the first action. If a third action is later brought between the same parties, it is the second and not the first judgment which is conclusive. Similarly, the second judgment is conclusive in the third action even though the first judgment was relied upon in the second action and the court erroneously held that it was not conclusive."

The record clearly indicates that Mr. Rapoport's refusal to enter the judicial arena of Nevada to raise the "defenses" he now asserts, including that of full faith and credit—*res judicata*, stemmed from his unilateral decision that Nevada did not have jurisdiction.²²

This conclusion was legally fatal to him.

²²Record pp. 7, 57, 58, 131-133.

By willfully (a) refusing to enter a general or special appearance in the Nevada action, (b) failing to raise in the Nevada action any of the "defenses" which he now asserts, and (c) doing nothing else in Pennsylvania or Nevada except to employ the bizarre but scarcely legally effective method of attempting to present alleged defenses to the Nevada court through extra-curricular waving of an alleged Pennsylvania decree in the faces of the Washoe County Nevada Clerk of Court, the Attorney General of Nevada, and all the Judges of Washoe County, Mr. Rapoport has effectively waived his rights.²³

As Judge Craven in the Nevada divorce proceeding, and thereafter Judge Thompson in the pending proceeding, said:

"[T]here are ways and means legally to proceed with such matters, and if they are so vitally concerned to bring this matter to the attention of this Court, they should have either made a general or special appearance in this action to do so. By a special appearance they could have adequately done this without submitting the defendant to the jurisdiction of this court."²⁴

"Hindsight persuades us that if Irvin Rapoport had accelerated the Pennsylvania divorce action to trial and final decision with vigor equal to that used in bombarding Rose Rapoport, her attorneys, the At-

²³The Nevada Rules of Civil Procedure, similar to the rules of so many other jurisdictions as well as the Federal Rules of Civil Procedure, recognize the concept of full faith and credit—res judicata as being merely an affirmative defense which, if not raised, is waived.

Rules 8(c) and 12(h) of the Nevada Rules of Civil Procedure;

Rules 1030, 1032 of the Pennsylvania Rules of Civil Procedure;

Rules 8(c), 12(b) of the Federal Rules of Civil Procedure.

²⁴Record p. 44.

torney General of Nevada and four Nevada District Judges with injunctive orders, he might have accomplished his objective of retaining an estranged wife within the matrimonial web.”²⁵

Accordingly, even if the Pennsylvania court had decreed—which it did not—that it possessed prior exclusive jurisdiction over the parties and subject matter; and

Even if the Pennsylvania court had decreed—which it did not—that Mrs. Sirott was a Pennsylvania domiciliary; and

Even if the Pennsylvania court had entered an injunction decree—which it did not—which was final and entitled to full faith and credit; and

Even if the Nevada court was barred—which it was not—by *res judicata* from making findings concerning its own jurisdiction over the marital status of the parties; and

Even if Mr. Rapoport had properly and legally advised the Nevada court—which he did not—of the “defenses” available to him and the Nevada court had erroneously—which it did not—ruled against him;

NEVERTHELESS, so long as Mrs. Sirott was a Nevada domiciliary at the time of her divorce action it is the Nevada divorce decree which is entitled to full faith and credit and, therefore, the order of the Court below should be affirmed.

²⁵Record p. 161.

III.

EN PASSANT

(a) In any event, the Pennsylvania injunction decree, even if pleaded properly in the Nevada divorce proceeding, would not have been entitled to full faith and credit.

The law is crystal clear, both in Pennsylvania and elsewhere, that injunction proceedings operate only against parties and not against courts.

For instance, when speaking about an injunction of the same nature as that in the instant proceeding the Supreme Court of Pennsylvania itself said in the case so heavily relied upon by Mr. Rapoport:

“When an injunction is granted for this purpose, it is in no just sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to them and does not even assume to interfere with them. The process is directed only to the parties. It neither assumes any superiority over the court in which the proceedings are had, *nor denies its jurisdiction.*” (Emphasis supplied)

Wenz v. Wenz, 400 Pa. 397, 399, 162 A.2d 376, 377 (1960)

In a more recent instance Pennsylvania has also said:

“... our case law indicates the desirability of restraining a potential litigant from proceeding upon a cause of action rather than restraining the tribunal from hearing the matter. See *Rothman v. Rothman*, 425 Pa. 406, 228 A.2d 899 (1967); *Wenz v. Wenz*, 400 Pa. 397, 162 A.2d 376 (1960).”

Peters Sportswear Co., Inc. v. American Arbitration Assn., 427 Pa. 152, 155; 233 A.2d 558, 560 (1967)

To mention just a few examples of the universality of the rule, the following quotations from other jurisdictions should suffice:

“[W]here other States have enjoined litigants from proceeding with a previously instituted Illinois action, this jurisdiction has followed the overwhelming judicial opinion that neither the full-faith-and-credit clause nor rules of comity require compulsory recognition of such injunctions so as to abate or preclude the disposition of the pending case.”

James v. Grand Trunk Western Railroad Company,
14 Ill. 2d 356, 363, 152 NE 2d 858, 862 (1958)

“It is apparent that an injunction against the prosecution of an action in another state acts upon the parties rather than the court, and, therefore, the court in which the enjoined action is pending has the power to proceed with the litigation despite the injunction.”

Klienschmidt v. Kleinschmidt, 343 Ill. App. 539, 546,
99 NE 2d 623, 626 (1951)

“There is something quite objectionable about assuming jurisdiction of a case the prosecution of which has been lawfully enjoined by a thoroughly respectable court of another jurisdiction. It creates the feeling that this court is an aider and abettor in the violation of the injunction and is in a sense in contempt of the court whose injunction it helps plaintiff to violate. However, the decisions of the Minnesota Supreme Court are respectable authority for the proposition that comity does not require that such injunctions be respected in the State of Minnesota, and I find no federal cases to the contrary.”

Doyle v. Northern Pac. Ry. Co., 55 F.2d 708, 710
(D.C. Minn. 1932)

“The injunction is only as to the parties and not the court. This court may proceed despite the injunction and render a valid decree.”

* * *

“Even though an injunction may issue against a suit in another state or county for divorce or separation (citing cases) a court is not compelled to observe such a decree.”

Cunningham v. Cunningham, 25 Conn. Sup. 221, 200 A.2d 734, 736 (1964)

“While a court usually will not, as a matter of comity permit a party to violate an injunction issued in another state against prosecution of the suit in such court, neither comity nor the full faith and credit clause of the federal constitution requires a court to respect such an injunction, it operating against the parties and not the foreign court.”

21 CJS, Courts, §554, page 860, and cases cited therein.

“While there are some decisions which maintain the contrary doctrine, the better opinion is that the court in which the action sought to be enjoined is pending may proceed despite the injunction, in case the enjoined party chooses to brave the consequences of committing a contempt by disobeying the order, and the judgment of the court of law will be valid just as though no injunction had ever been issued.”

43 CJS, Injunctions, §50, pp. 503, 504, and cases cited therein.

See also 28 Am. Jur., Injunctions, §227, p. 734, and cases cited therein.

From the foregoing, therefore, there is no doubt that, utterly aside and apart from any other consideration, the Pennsylvania injunction was not entitled to full faith and credit.

(b) The Pennsylvania court never determined that Mrs. Sirott was domiciled in Pennsylvania.

Mr. Rapoport seems to argue that the Nevada court was also barred by res judicata from finding that Mrs. Sirott was domiciled in Nevada because in the Pennsylvania injunction proceeding it was somehow or somewhere determined that Mrs. Sirott was domiciled in Pennsylvania when the injunction was entered.²⁶

Aside from what already has been stated at the outset of this brief, the answer to this contention is two-fold:

1. The Pennsylvania court did not so determine;
2. The Pennsylvania court was not required to so determine.

The record in the Pennsylvania injunction proceeding²⁷ shows that on June 24, 1964, there was no hearing, there was no testimony, there was no evidence taken,²⁸ there

²⁶Appellant's Brief, page 40.

²⁷Record pp. 176-208, 244-245.

²⁸Moreover, Mr. Rapoport cites no authority for what appears to be his contention that an allegation as to domicile is a pure averment of fact which requires a denial. Indeed, as every first year law student knows, averments as to domicile are a combination of allegations of fact and conclusions of law and therefore do not require specific pleadings in denial thereof. *Sivalls v. U.S.*, 205 F.2d 444 (5th Cir. 1953); *Taylor v. Milam*, 89 F. Supp. 880 (W.D. Ark. 1950); *Hicks v. Hicks*, 80 F. Supp. 219 (D.D.C. 1941).

were no findings of fact, there were no conclusions of law.²⁹

There was simply a decree presented by counsel to the Judge who in turn merely dated and signed it—nothing more!³⁰

Secondly, the Pennsylvania court undoubtedly did not require a finding or conclusion as to Mrs. Sirott's domicile to be inserted in the decree because such a determination was not a prerequisite to jurisdiction.

Mr. Rapoport himself, in his own brief on page 12, acknowledges in the following language that a conclusion of domicile was not a prerequisite in the Pennsylvania proceedings:

“Irrespective of the domicile of the spouse seeking the divorce, injunctive relief will be granted where the courts of the injunction forum have first acquired jurisdiction of a matrimonial action between the parties” (which) *“would be deprived of its effect by the maintenance of a divorce action in a foreign jurisdiction.”* (Emphasis supplied)

If the cases cited by Mr. Rapoport establish nothing else, they are nevertheless definite authority for the proposition that under Pennsylvania law injunctions in

²⁹If in fact domicile were a jurisdictional prerequisite to the issuance of the Pennsylvania injunction decree, then a finding and conclusion with respect thereto would undoubtedly have been reviewable by the Nevada court under the doctrine of the second *Williams* case.

³⁰Even if the Pennsylvania court had determined that Mrs. Sirott was a Pennsylvania domiciliary *as of June 24, 1964* (which it did not), this, of course, did not and could not preclude the Nevada court, or any other court, from reaching a different conclusion *as of July 6, 1964*.

divorce actions may be maintained irrespective of the domicile of the parties.

Rothman v. Rothman, 425 Pa. 406, 228 A.2d 899 (1967);

Wenz v. Wenz, 400 Pa. 397, 162 A.2d 376 (1960).

In *neither* of these two cases did the court determine, or even attempt to determine, the domicile of *either* party, let alone the defendant's.

The rationale of both cases seems to be, as the court below has correctly indicated, that at most the injunction decree was merely issued in aid of protecting and preserving the jurisdiction of the Pennsylvania divorce court over the pending litigation and, as such, the domicile of the parties was irrelevant.

Accordingly, even if there were some legal significance in there being a finding as to Mrs. Sirott's domicile at the time of the Pennsylvania injunction, such a finding is nowhere to be located.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be affirmed.

Respectfully submitted,

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March 26, 1968.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Appellee

No. 22,415

IN THE

United States Court of Appeals

For the Ninth Circuit

IRVIN RAPOPORT,

Appellant,

VS.

ROSE RAPOPORT, also known as JOAN SIROTT,

Appellee.

**Appeal from the United States District Court
for the District of Nevada**

APPELLANT'S REPLY BRIEF

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No. 22,415

IN THE

**United States Court of Appeals
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IRVIN RAPOPORT,

VS.

ROSE RAPOPORT, also known as JOAN SIROTT,

Appellant,

Appellee.

**Appeal from the United States District Court
for the District of Nevada**

APPELLANT'S REPLY BRIEF

Careful and unhurried reflection on the posture adopted in appellee's Brief convinces appellant that its (to him) singular character is attributable to two major factors:

1. An unyielding refusal to make any remarks whatsoever about unfavorable facts, no matter how fundamental they might be; coupled with an equally steady avoidance of reference to cases and principles of law (already cited) which have a similar effect on the appellee's position. Appellant submits that this silence speaks far more loudly for him than the most inspired rhetoric.

2. A recital of principles of law, selected by quotation from cited cases, accurate *in the main* as to the validity of the principles themselves, but either (a) Mere dicta in the cited cases; (b) Mere dicta when applied to facts in the case at bar; or (c) Applied, specifically or by necessary inference, to the Nevada decree when, under the facts of the cases involved, they should apply instead to the Pennsylvania decree. (In much the same way that a reversible coat is turned inside out.)

So uniform is this mode of handling the factual and legal materials involved that appellant is obliged to resort to a point-by-point reply; to follow by pointing out the omissions; and conclude by commenting briefly on the choice of alternatives presented to the Learned Court by the facts and the arguments of the parties.

**I. REBUTTAL TO APPELLEE'S STATEMENT OF THE CASE:
SHE FORGETS THE PRIOR PENDING PENNSYLVANIA
DIVORCE ACTION.**

Appellee's very first sentence begs the entire question by assuming the answer to one of the most basic problems to be decided by the Court;—stating flatly that she had fulfilled the domiciliary requirements of Nevada before commencing her Nevada proceedings. It would seem superfluous for the Court to consider the case at all if

this question were thus foreclosed: but we recall from the actual Record that she herself alleged she was a Pennsylvania resident and domiciliary (X 1, RT 6, CT 265); never claimed change of residence, even in Nevada, until May 7, 1964 (X 3, RT 7, CT 29); had commenced a Pennsylvania divorce action on December 19, 1963 (X 1, RT 6, CT 263) which she was actively pursuing on May 1, 1964 (X 1, RT 6, CT 301); and that *appellant had averred she was a Pennsylvania domiciliary on May 20, 1964* (X 2, RT 6, CT 194-196) in a Complaint in Equity to which she never filed a denial (X 2, RT 6).

Similarly, the permanent injunction secured by appellant was, precisely, *not ex parte*, as she claims. Appellee was already subject to the jurisdiction of the Pennsylvania court by reason of her domicile and her voluntary choice of it as the forum for her divorce action, and the injunction arose out of this very subject-matter.¹ See Opening Brief, pp. 16-23.

Appellant concedes that he asserted no "defenses" in the Nevada action: everyone agrees he was never personally served and did not appear, either specially or by counsel. It is thus the Nevada decree that, without dispute, is the one that was entered *ex parte*.

Appellee did indeed go through a marriage ceremony with Sirott on the very day she received her Nevada decree, but he was no "Nevada businessman", a Pennsylvania court having already found him on June 24, 1964 to be a Pennsylvania domiciliary (see *Sirott v. Sirott*,² Appellant's Opening Brief, pp. 45-47); a conclusion to which he failed to press on appeal.

What strikes appellant as most extraordinary about this Statement is that nowhere in this recital of "facts"

¹*James v. Grand Trunk Western R. Co.*, 14 Ill.(2d)356, 152 NE (2d) 858 (1958); *Dorney v. Dorney*, 245 F(2d) 201 (4 Cir. 1957); *Rothman v. Rothman*, 424 Pa. 406, 228 A(2d) 899 (1967); Re-statement, *Conflict of Laws*, §77(1)(e) pp. 114, 115.

²85 Montg L R 228 (Pa. 1965).

is there the slightest reference to those facts *completely uncontradicted in the Record and admitted by appellee in her own testimony under oath (RT 12) that she was still actively engaged in a prior Pennsylvania divorce action instituted by her, when she went to Nevada to get a divorce on the advice of her Pennsylvania attorney (RT 12).*

II. SINCE EVERY CASE CITED BY APPELLEE DEMONSTRATES THAT SHE WAS BARRED FROM RELITIGATING, IN NEVADA, PENNSYLVANIA'S FINDING OF JURISDICTION, APPELLANT'S "OBLIGATION TO DEFEND" WAS NIL.

The first question in this appeal is *not*, as appellee asserts (p. 4) whether the court below was "clearly erroneous" in finding as a fact "that (appellant) did not sustain the burden of proof of overcoming the presumption of appellee's 'domicile' established by the Nevada decree": it is the last. In fact, *since she was personally subject to Pennsylvania's jurisdiction, appellee must overcome that very presumption regarding jurisdiction with respect to the Pennsylvania decree of Permanent Injunction of June 24, 1964 (twelve days earlier);*³ and appellant has pointed out repeatedly that since she offered no proof—in fact, did not even plead the offer—to overcome that presumption, the subsequent finding by Pennsylvania concerning her domicile and jurisdiction became *res judicata*, and thereby barred the Nevada court from making any finding of its own choice on jurisdiction.⁴

³*Williams v. North Carolina*, 325 U.S. 226, 233-4, 65 S.Ct. 1092, 1097 (1945); *Stoll v. Gottlieb*, 305 U.S. 165, 171, 172, 59 S.Ct. 134 (1938); *Cook v. Cook*, 342 U.S. 126, 128, 72 S.Ct. 157 (1951).

⁴*Sutton v. Leib*, 342 U.S. 402, 72 S.Ct. 398 (1952); *Sherrer v. Sherrer*, 334 U.S. 343, 68 S.Ct. 1094 (1948); *Treinius v. Sunshine Mining Co.*, 308 U.S. 66, 76-78, 60 S.Ct. 44 (1939).

Thus, it follows inexorably that the citations of the *Rice*, *Esenwein*, and *Williams*⁵ cases (all correctly stated as to principle, at least) apply to *place that burden of proof on appellee*, not on him; and her persistent effort to place the cart before the horse—the Nevada decree *before* the Pennsylvania decree—is, therefore, devoid of legal merit.

We are asked how appellant can possibly explain his wife's assumption of Nevada domicile "shortly after" July 6, when she was not a domiciliary shortly before. The answer is the essence of simplicity: she intended to marry Sirott immediately upon securing her divorce, and *thereafter* live with him wherever he chose. He chose, *bona fide* or otherwise, to claim Nevada as his legal residence, and this residence accordingly became hers at that time. *If he had chosen to live in Alaska, she would never have become a Nevada resident.*

Appellant is no more impressed than was the Pennsylvania court which issued the Permanent Injunction that the letters, fully described in his Opening Brief (p. 42), all postmarked from New Jersey during the ostensible six-week period of her physical presence in Nevada, written by appellee in her own hand and claiming a Pennsylvania return address on two of them, constituted "flimsy" evidence: and three of them (X 15-17) were obviously introduced into evidence in Pennsylvania, *since the Exhibits themselves show on their faces "P-3", "P-4", and "P-5", clearly not the designations of the court below.* Since their only materiality would be on the question of appellee's domicile during this period, two baseless claims advanced by appellee are destroyed at the same time: (1) *there was a hearing in Pennsylvania to secure the*

⁵*Rice v. Rice*, 336 U.S. 674, 69 S.Ct. 751 (1949); *Esenwein v. Pennsylvania*, 325 U.S. 279, 65 S.Ct. 1118 (1945); *Williams v. North Carolina* (#1), 317 U.S. 287, 63 S.Ct. 207 (1942); *Williams v. North Carolina* (#2), *supra*.

permanent injunction, at which testimony was taken; and (2) that testimony covered appellee's domicile, an issue which the court decided against her.

There is, accordingly, no basis for appellee's assertions to the contrary (pp. 18, 19) concerning a hearing which her counsel did not attend, but at which appellant and his counsel were definitely present.⁶

Appellant has never claimed that if appellee were legally a Nevada domiciliary on June 24, 1964, the Nevada court would be "precluded from exercising jurisdiction over her divorce" (p. 8): he categorically argues that Pennsylvania found on that date that she was a Pennsylvania domiciliary, subject to its jurisdiction, and that Nevada was accordingly barred, by *res judicata*, from re-litigating that issue.⁷ She had appeared before Pennsylvania on the same subject matter, she as well as appellant was still before the court, and the final decree so entered bound her personally.⁸

It is, therefore, not appellant, but she, who was duty bound to appeal the jurisdictional finding against her to the Pennsylvania appellate court or waive her objections to that holding; *and all* (except the *Williams* cases) *of the cases cited by appellee in her brief* (p. 9) *specifically so hold.*

⁶If that hearing was a mere formality, why did that Court not also sign and file Findings of Fact and Conclusions of Law which appellant's counsel undoubtedly would have submitted for that purpose, as well as the Decree of Permanent Injunction? Moreover, that appellee's Pennsylvania counsel (who admittedly instructed appellee to evade Pennsylvania's already attached jurisdiction and secure a divorce elsewhere, and prepared her Brief) should dare to urge upon us that the veteran President Judge of a court of which he is an officer, was lying when he stated his Decree was entered "*after hearing*" (X 2, RT 6, CT 244)—*when counsel himself was not there*—appellant finds shockingly unprofessional.

⁷*Sutton v. Leib, supra*, and other cases cited this Brief, p. 4.

⁸*Sutton v. Leib, supra.*

Since in every one of them (except the *Williams* cases), *both parties were before the court* (the situation which here obtained only in Pennsylvania) it is the Pennsylvania defendant—appellee—who was foreclosed by failure to appeal the finding on jurisdiction. In Nevada, on the other hand, everyone grants that appellant was never before the court; and the law has always allowed the defendant against whom an *ex parte* decree has issued to attack its jurisdiction collaterally. *This is what the Williams cases hold.*⁹ This is what appellant has done in the case at bar.

III. SINCE NEVADA'S FINDING OF JURISDICTION WAS BARRED BY RES JUDICATA, ITS SUBSEQUENT DECREE WAS VOID, AND THUS NOT ENTITLED TO FULL FAITH AND CREDIT.

Since appellee's Brief sometimes overlooks material facts in the cases she cites (where she gives them at all) appellant will attempt to rectify this deficiency.

In the *Morris*¹⁰ case, plaintiff sued an Illinois corporation doing business in Missouri, in the latter state. Illinois appointed a statutory receiver for the defendant. *Plaintiff secured judgment in Missouri first*, and filed an exemplified copy of his judgment in Illinois, asking that it be accorded Full Faith and Credit there. It will be noted that both parties were before both courts. Illinois disallowed his claim, and after state appeal failed, he sought Federal relief.

The Supreme Court, with the author of the *Williams* majority opinions writing for the majority here, held that

⁹See, to the same effect, *Sutton v. Leib*, *supra*; *Cook v. Cook*, *supra*; *Rice v. Rice*, *supra*.

¹⁰*Morris v. Jones*, 329 U.S. 545, 67 S.Ct. 451 (1947).

as to the matters involved in the Missouri suit, plaintiff's claim was good and entitled to Full Faith and Credit, reversed the Illinois judgment, and stated:

"A judgment of a court having jurisdiction of the parties and subject matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default . . . Such a judgment obtained in a sister state is . . . entitled to full faith and credit in another State though the underlying claim would not be enforced in the State of the forum." (pp. 550, 551)

It is of interest that Illinois made the same claim that appellee makes here: that it is the later Illinois decree which is really entitled to full faith and credit. Mr. Justice Douglas disposes of this contention as follows (at p. 552):

"As to" (appellee's) "contention that the Illinois decree, of which petitioner had notice, should have been given full faith and credit by the Missouri court, only a word need be said. *Roche v. McDonald*, supra, pp. 454-455, makes plain that the place to raise that defense was in the Missouri proceedings. And see *Treinius v. Sunshine Mining Co.*, 308 U.S. 66, 77 . . . In any event, the Missouri judgment is *res judicata* as to the nature and amount of petitioner's claim as against all defenses which could have been raised." (Citing cases).

He then concludes (at p. 553):

"The command is to give full faith and credit to every judgment of a sister state. . . . The function of the Full Faith and Credit Clause is to resolve controversies where state policies differ. Its need might not be so greatly felt in situations where there was no clash of interests between the States. . . . But the answer given by *Fauntleroy v. Lum*" (210 U.S. 230) "is conclusive. If full faith and credit is not given in that situation, the Clause" (fails where its) "need is the greatest."

In the *Southard*¹¹ case (first brought to the attention of the court below by appellant in support of its jurisdiction), H got an ex parte Nevada divorce, and W sued thereafter for divorce in Connecticut. *H appeared in Connecticut and set up his Nevada decree as a defense.* When that court found for W, *he did not appeal*, but applied for a declaratory judgment in Federal court, which dismissed his action. On appeal, the Court affirmed, stating (before the quotation to be found on page 11 of appellee's brief) (at p. 732):

"... We ... would affirm the order of dismissal because, as appellee now asserts, the complaint reveals facts which show that the action is barred by principles of *res judicata*. If we were to reverse the district court's order, it would be compelled on remand to grant appellee's inevitable motion under Rule 12(b) (6) of the Federal Rules of Civil Procedure to dismiss the action as *res judicata*. . . . It is clear from the appellant's complaint that—as he admits in his brief on this appeal—he entered an appearance in the Connecticut divorce action, the outcome of which he seeks here to attack. His person was thus under the jurisdiction of the Connecticut court, and there are no allegations which could support collateral attack on that judgment. Whether or not he subsequently defaulted as to the further proceedings leading up to the judgment, and whether or not he was deprived of rights by errors of the Connecticut court, our determination that the court had jurisdiction over him and the case precludes any further attack on the judgment. *Morris v. Jones*, 329 U.S. 545, 67 S. Ct. 451 (1947)."

It will be noted that the petitioner in the cited case occupies exactly the same legal position as the instant appellee.

Appellant not only finds no fault with Restatement of the Law, *Judgments*, § 42 cited by appellee; he is pleased

¹¹*Southard v. Southard*, 305 F(2d) 730 (2 Cir. 1962).

to observe that since it supports the *Southard* case, *supra*, it supports his position, not appellee's. Only appellee was before the Nevada court in the instant case, but both parties were before the Pennsylvania court; and accordingly her conclusion (p. 12) that "Rapoport's refusal to enter the judicial arena of Nevada to raise . . . res judicata . . . was legally fatal to him" is erroneous. On the contrary: as both *Southard* and Section 42 indicate, *it was legally fatal to appellee in Pennsylvania*.

Thus, while we may admire the vividness of appellee's peroration based on hypothetical facts¹² we must recognize that the conclusion she has so laboriously erected thereon is not only likewise hypothetical but (from a legal standpoint) sheer fantasy.

IV. A PROPERLY ENTERED FINAL JUDGMENT, VALID IN THE STATE OF ISSUANCE, IS ENTITLED TO THE SAME EFFECT ELSEWHERE AS IT WOULD RECEIVE WHERE ISSUED; AN INJUNCTION STANDS IN NO DIFFERENT POSITION THAN ANY OTHER JUDGMENT, AND CONFINEMENT OF ITS RECOGNITION TO CONSIDERATIONS OF "COMITY" IS NOT LAW.

The "in passing" section of appellee's brief will be examined after we note Restatement, *Conflict of Laws*, § 450(2):

"§ 450 Effect of Valid Foreign Judgment . . . (2) The effect of a valid judgment as a conclusive adjudication between the parties and persons in privity with them of facts which were *or might have been put in issue* in the proceedings is determined by the law of the state where the judgment was rendered."

See, also Restatement, *Conflict of Laws*, § 451(2) pp. 160, 161 (1948 Supplement) which was specifically revised

¹²Appellee's Brief, p. 14.

on the statement of *res judicata* and jurisdictional facts in the light of the *Davis*, *Stoll* and *Treinies* cases (*Sherrer v. Sherrer* and *Sutton v. Leib*, at that time, were still in the future).

Appellant has never claimed his injunction was directed to the Nevada Court itself, and will certainly not quarrel with the results reached in the *Wenz*¹³ case. As an objective study in the dexterity with which appellee reviews cases, however, the use of the cited quotation from *Wenz* is notable. This language, mentioned by the court *without comment*, proceeds from the 1935 case of *Trees v. Glenn*, 319 Pa. 487, 181 A. 579, (in which it is dictum), which in turn has merely quoted it from Ruling Case Law, an even earlier authority. What the court in the *Wenz* case really concludes, however, is (at p. 400):

“Until the litigation in Lehigh County” (Pennsylvania) “has been terminated, there can be no justification for a suit between the same parties, involving the same issue, and instituted subsequent to attachment of the jurisdiction of the court below, to be pending elsewhere.”¹⁴

Appellee's quotation is therefore mere dictum.

The statement in the *Peters* case is also mere dictum: that suit involved an attempt to restrain an arbitration association from arbitrating a contract dispute, and was controlled by the finding that defendant was not a necessary party to the controversy under the contract.

However, appellee makes it clear that in her view, an injunction, in spite of Sections 429, 430 and 450(2)¹⁵ *supra*, is not entitled to the same effect as all other judgments and decrees, by (apparently) its general nature.

¹³400 Pa. 397, 162 A(2d) 376 (1960).

¹⁴For a full review of the *Wenz* facts, see Appellant's Opening Brief, pp. 21, 22.

¹⁵All from Restatement, *Conflict of Laws*.

Appellant takes flat issue with this position, and contends that (1) Where the injunction was issued by the court which first obtained jurisdiction over both of the parties and the subject matter; (2) that where it was the first *final* decree rendered on the subject matter at issue; (3) that where it issued after reasonable notice to the parties to be affected thereby and after hearing; (4) that where it related to a marital dispute in the marital domicile of the parties; and (5) where the party who was enjoined, herself submitted the subject matter to court for determination in the first instance: *that where all five of these factors are unchallengeably present* (as they are in the case at bar), *the Permanent Injunction issued is entitled to the protection of the Full Faith and Credit Clause like any other judgment of equal stature, and not merely to the dubious allowances of comity.*

He further urges that appellee's position is not supported by law on these facts; and that despite some language in distinguishable cases redolent of the "comity" test utilized in the overruled case of *Haddock v. Haddock*, 301 U.S. 562 (1906) (which was confined to the shelf of history by the first *Williams* case in 1942) *there has not been a single American case discoverable by him, on these facts, which has so held.*

In *James v. Grand Trunk Western R. Co.*, *supra*, cited by both appellant and appellee (although for different propositions) plaintiff, a Michigan citizen, commenced a purely transitory action in Illinois, in which defendant appeared. Defendant, however, secured a Michigan injunction against her to prevent the prosecution of the prior Illinois action. Plaintiff applied for and, finally, obtained, a counter-injunction from the Illinois Supreme Court against the Illinois defendant, to prevent it, in turn, from harassing her in Michigan. It will be seen at once that Illinois (like Pennsylvania in the instant case) had prior jurisdiction, which the Illinois court described as exclu-

sive; and *although it dealt with a transitory action only*, that court attached such importance to Consideration No. 1, *supra*, that it felt empowered to offer the extreme remedy of counter-injunction. Moreover, the United States Supreme Court was sufficiently satisfied with this result to deny certiorari: 358 U.S. 915, 79 S.Ct. 288. It is hard to see how this case aids appellee, *on the facts in the case at bar*.

Similarly, the *Kleinschmidt*¹⁶ case is readily distinguishable. The parties to this marital dispute were living in Florida. The husband started a divorce action there; his wife left, went to Illinois, started a second divorce action against him there and secured from the lower court an injunction restraining her husband from continuing with his Florida proceedings. On appeal, this injunction was dissolved as improper. Clearly, the prior jurisdiction of Florida over the parties and subject matter had once again carried the day.

Doyle v. Northern Pac. R. Co., also cited by appellee, heads the list of a handful of Minnesota cases (and one Missouri case) which supports the single sentence cited by appellee from 21 C.J.S., *Courts* §554, p. 860. Several crucial points of distinction emerge:

(1) *This case was decided in 1932, when the Haddock case was still the law;*

(2) *This case and all the other cases cited were mere transitory actions, not a single one involving a marital dispute, in which the state of marital domicile has an undisputed interest. Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207 (1942);*

(3) The very sentence preceding the quote from 21 C.J.S. *Courts*, § 554, *supra*, states (at p. 859):

¹⁶*Kleinschmidt v. Kleinschmidt*, 343 Ill. App. 539, 99 NE(2d) 623 (1951).

“A court of one state or country cannot of course restrain the prosecution of an action in a court of another state or country by any order or decree *directed to the court or its officers; but a court which has acquired jurisdiction of the parties has power, on proper cause shown, to enjoin them from proceeding with an action in a court of another state or country*,¹⁷ particularly where such parties are citizens or residents of the state, or with respect to a controversy between the same parties of which it obtained jurisdiction prior to the foreign court.” (Emphasis supplied)

(4) The very sentence following appellee’s quote states (at p. 860):

“The courts of a state may enjoin enforcement of a palpably void foreign judgment between citizens of the state and of whom it has obtained jurisdiction.”¹⁸

Appellant confesses a certain surprise that appellee should have the temerity to quote from *Cunningham v. Cunningham*, 25 Conn. Sup. 221, 200 A(2d) 734 (1964). Here W commenced a Connecticut action for divorce, in which H appeared and filed a counterclaim. W then went to Nevada, started a second divorce action there and then secured an ex parte injunction, which she then attempted to enforce in Connecticut. That court, after holding that since Connecticut first had jurisdiction it should be permitted to retain it without interference, and that W’s motion to enforce must be denied, states (at pp. 736, 737):

“In such cases, the injunction issues to preserve the rights of the parties and enables the court to do justice. Certainly, there is no greater equity in proceeding in Nevada rather than in Connecticut in this action. *The Nevada injunction was granted ex parte*

¹⁷Citing *Meyer v. Milliken*, 101 Colo. 564, 76 P(2d) 420 (1938); certiorari denied *Milliken v. Meyer*, 305 U.S. 598, 59 S.Ct. 63 (1938).

¹⁸Citing *Meyer v. Milliken*, *supra*.

merely upon the affidavit of the wife, and the hardship upon the husband is as great as that upon the wife..."

"The injunction was pendente lite given upon an affidavit *ex parte* without notice to the defendant, without hearing and without affording him a full and fair opportunity to contest the outcome."

The usefulness of the citation of 43 C.J.S., *Injunctions* § 50 to appellee's cause is likewise severely qualified by several factors: (1) the "judgment of the court of law" referred to depends for its validity on its jurisdiction over parties and subject matter; and where the judgment is an *ex parte* Nevada divorce decree, its jurisdiction can always be attacked collaterally—on this both case and text authorities are unanimous;¹⁹ (2) its citation support depends on a 1930 Alabama case and a 1939 West Virginia case (neither involving marital disputes)—both before the first *Williams* case in 1942; (3) It is immediately qualified by the following language:

"However, if the attention of the court is properly called to the fact that a party has been enjoined from proceeding, *it will usually not permit the party to disobey the injunction, and will stay the proceeding* out of respect for the court issuing the injunction." (Emphasis supplied)

The authority for this proposition is *Odom v. Langston*, 75 F.Supp. 651, 653 (D.C. Mo. 1948)—decidedly *after* the *Williams* case.

Appellee has already cited 21 C.J.S., *Courts*, *supra*. Section 548, pp. 855, 856 has the following to say:

"The court of one jurisdiction cannot presume that the court of another is incompetent to do justice in cases within its jurisdiction . . . The court in which

¹⁹*Sutton v. Leib*, *supra*, and other cited cases; 3 Freedman, *Marriage and Divorce in Pennsylvania* (2d Ed. 1957) § 792, pp. 1456, 1457.

the first action is commenced cannot be ousted of, nor will it yield, jurisdiction by reason of the subsequent commencement of another action between the same parties for the same cause of action in another state or country.” (Citing, in the 1967 Supplement, *Com ex rel Meth v. Meth*, 188 Pa.Sup. 553, 149 A(2d) 488 (1959)).

Finally, as for 28 Am. Jur., *Injunctions*, § 227, appellee might do well to examine the 1967 supplement. Appellee’s footnote number 28 (p. 18) deserves a footnote.²⁰

Two completely unfounded legal observations appear in appellee’s brief (p.19) and will be dealt with summarily.

These concern appellee’s footnote number 29 on page 19, to the effect that if Pennsylvania required proof of domicile as a jurisdictional prerequisite to the injunction, then its findings would be reviewable by the Nevada court. This is, very simply, not true. Appellee was already personally within the jurisdiction of the Pennsylvania court. Its finding as to jurisdiction either as to her person or the subject matter under these conditions may not be impeached. *Stoll v. Gottlieb*, *Treinies v. Sunshine Mining*, *Sherrer v. Sherrer*, and *Sutton v. Lieb*, *supra*.

Footnote number 30 on the same page is equally unfounded. If Pennsylvania determined appellee was a Pennsylvania domiciliary on June 24, 1964, even Nevada (which must concede its law requires a physically con-

²⁰While appellant cannot speak with authority on what first year law students know, he is aware that in Pennsylvania actions (like the Equity suit under consideration) Pennsylvania, not Federal, procedural rules apply. And under these rules, Equity procedure conforms to Assumpsit. Pa. Rule 1501. Under Assumpsit, Rule 1029(b) specifically states: “Averments in a pleading to which a responsive pleading is required *are admitted when not denied specifically or by necessary implication*”. The only exceptions are where the pleadings are closed, or the pleading to be responded to was not endorsed with a notice to plead. 2A Anderson, *Pennsylvania Practice*, pp. 230-236. Appellant’s Complaint in Equity was endorsed with a Notice to Plead (X 2).

tinuous six-week period to acquire the necessary local domicile to institute a divorce action) cannot telescope that requirement into 12 days: and no one can have two domiciles at the same time. (Assuming, *arguendo*, that Nevada had not already been foreclosed by *res judicata*).

Finally, we must correct appellee's appraisal of the *Rothman* and *Wenz* cases: in both of them, the opinions disclose, as facts, the local character of their initial residence.

What conclusions may we reach from the foregoing analysis, which has examined every authority advanced by appellee for the proposition that neither the instant, nor any, Permanent Injunction is entitled to full faith and credit?

Appellant respectfully suggests that every cited case either supports his position or is distinguishable on one or more fundamental grounds; that, further, even the statements of text authorities *on this point*, because of the blend of pre- and post-*Williams* cases relied upon to buttress those statements, present at best a confused picture, in which carefully selected dicta can scarcely stand against the formidable body of American law which sanctions, actively uses and honors the effectiveness of the injunction in extraterritorial marital disputes; and that, finally, appellee's reticence (notable on the facts) is nowhere more conspicuous than in her refusal to discuss the authorities cited by appellant.

She is silent on the Restatement sections quoted, and on Freedman; have they no bearing on this case? She offers no comment on the many Federal, Pennsylvania and other cases. She stands mute in the face of the great Supreme Court decisions of *Cole v. Cunningham*,²¹ *Davis v. Davis*,²² *Stoll v. Gottlieb* and *Sherrer v. Sherrer*.

²¹133 U.S. 107, 10 S.Ct. 269 (1890).

²²305 U.S. 32, 59 S.Ct. 3 (1938).

And not one word can she vouchsafe *Sutton v. Leib*, painstakingly reviewed for four solid pages in appellant's Opening Brief and mentioned therein on five other pages. Is not this the most eloquent silence of all?

V. WHAT IS THE LAW TODAY?

The most respected and forward-looking, and the more modern authorities have no hesitancy in ascribing to Injunctions the same dignity and effect accorded other judgments and decrees of similar regularity and finality.

As far back as 1919, Barbour, in a notable article in 17 Mich. L. Rev. 527, 528, discussed the undisputed recognition accorded an equitable decree for the payment of money by defendant in a foreign state, and criticized the attempted distinction between such a decree and one ordering the doing or refraining from an act (specifically, to convey land):

"There appears to be no sensible reason for this distinction. The decree assumes substantially the same form, whether it be for the payment of money or the conveyance of land; it is *formally* but an order to the defendant to do an act, which may be the payment of \$1,000 or the execution of a deed to Blackacre. Likewise, in the matter of enforcement, aside from statutory innovations, the method is the same in both types of decrees. Any argument drawn from the form of the decree or the means by which it is enforced applies equally to the decree for money . . . When a judge . . . today declares that a foreign decree ordering the conveyance of land creates no obligation but merely a duty owed by the defendant to the court, he is assuming that equity has made no progress since the time of Coke."

Goodrich, who lists six alternative bases for acquiring jurisdiction in personam over a defendant (*all* of which

are present in the case of appellee with regard to Pennsylvania), goes on to say:

“Jurisdiction over the person of the (defendant) once acquired, continues although prior to final determination of the cause the (defendant) has left the state.” Goodrich, *Conflict of Laws* (3d Ed. 1949) § 73, pp. 188, 190; and then concludes:

“The doctrine of *res judicata*, that a cause of action once finally determined, without appeal, between the parties, on the merits, by any competent tribunal, cannot afterwards be relitigated by new proceedings either before the same or another tribunal, is fully as applicable to final decrees in equity as to judgments at law, and is by no means limited to those ordering payment of money. In short, the court of equity today stands as a tribunal equal in dignity to that of a court at law. Its orders and decrees should receive the same respect when questions regarding them arise in other states as are given, under established rules of *Conflict of Laws*, to the judgments of law courts.” *Supra*, § 218, p. 642.

See, also, Restatement, *Conflict of Laws*, § 450(2) and § 451(2), pp. 160, 161 (1948 Supplement) *supra*.

All of these authorities, taken together with those cited in appellant's Opening Brief, disclose to us unmistakably, appellant urges, the effect Permanent Injunctions such as his will inevitably have in marital disputes, now and in the future—particularly when we consider that the author of the *Williams* opinions is still with us to dispel any misapprehensions we might entertain on the subject.

VI. THE ALTERNATIVE CONSEQUENCES OF THE CHOICE PRESENTED TO THE COURT.

The social-jurisprudential aspects of this problem deserve the final word. A finding in appellee's favor would be tantamount to advising the American bench and bar

at large that the entire corpus of long-developing principles and case law supporting the issuance of injunctions to restrain unfair litigation in foreign states is to be jettisoned in its entirety; for, if an injunction possessing all of the attributes of the instant decree is not entitled to mandatory recognition, it is impossible to conceive of one that would be.

If injunctions are not entitled to recognition elsewhere, they will be totally unenforceable unless the injunction defendant is accommodating enough to return to the injunction state and wait until legal process seizes him for contempt. This, it must be admitted, is a rather remote possibility. Such a result, then, would have a most sweeping and, it is submitted, a most disastrous effect on legal practice, without any offsetting social virtue.

On the other hand, a reversal of the order of the court below would have a highly limited effect, since such a decision would mean only that (1) where a party submits her person to one jurisdiction, which also has jurisdiction over the other party and the subject matter of a marital dispute; (2) subsequently goes to another jurisdiction and institutes a similar action against the same party (who never appears in the second state) while the first action is still in active progress; (3) the first jurisdiction then enters a Permanent Injunction against her, after reasonable notice to her and a hearing: then only will the Permanent Injunction's findings as to jurisdiction over her and the subject matter be entitled to Full Faith and Credit, and the question of jurisdiction barred by *res judicata* in the second state.

Limited in scope as such a finding would be, it must redound to the advantage of the deserted housewives of the nation; for, ironically, appellant may be unique in that he is probably the only man who has ever enjoined his wife from securing a divorce. It is the wives who need and secure injunctions.

Appellant suspects that the only reason this issue has not been previously decided squarely on its merits is because the usual holder of the Injunction—the wife—is without the financial resources to press such an issue to its legal conclusion.

Finally, any verbal conflict concerning the treatment and respect to be accorded the Injunction, as a legal remedy, would be resolved once and for all, to the benefit and clarification of the bench and bar as a whole.

For all these reasons, then: that logic and the rules of both law and equity indicate its right to recognition; that modern law, evolving while adjusting to the needs of modern society, recognizes its usefulness by necessary implication, and its destruction as unthinkable; that such recognition possesses the favor of our soundest thinkers in jurisprudence today: appellant respectfully submits that your Honorable Court should reverse the court below, declare the Pennsylvania Permanent Injunction valid and entitled to Full Faith and Credit everywhere, under Article IV, Section 1; and declare the ex parte Nevada divorce null and void.

Dated, April 11, 1968.

Respectfully submitted,

ROBERT DANFORTH,

SHELDON W. FARBER,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

SHELDON W. FARBER,
Attorney for Appellant.

NO. 21415 ✓

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 19 1969

JACK BAROFSKY,

Appellant,

*See Vol.
3397*

vs.

GENERAL ELECTRIC CORPORATION,

Appellee.

Appeal from the United States District Court
for the Central District of California

PETITION FOR RECONSIDERATION

(Including Suggestion for Re-Hearing
by the Court en banc)

FILED

WM B. L. L. L.

SMYTH, ROSTON & PAVITT,
WILLIAM H. PAVITT, JR.,
CHARLES H. SCHWARTZ

By WILLIAM H. PAVITT, JR.
4262 Wilshire Boulevard
Los Angeles, California 90005

Attorneys for Appellant

Petitioner (appellant) respectfully submits that the opinion of his Honor, Judge Hamley, for the majority of the Court, reveals that the majority has failed "to see the forest for the trees" in discussing what it conceives to be the several individual and dominant features of petitioner's patented design, namely, the length, width and depth of the doors, the use of sound permeable fabric (grille cloth), the presence of bevels and the hinging of the doors. The opinion then, in effect, concludes as a matter of law that all of these features primarily serve a functional purpose so that the design patent is invalid.

What the majority opinion appears to overlook entirely, however, is that the principal and dominant feature of the patented design does not lie in the details of construction of the doors thus discussed in its opinion, but rather in the symmetrical and pleasing appearance resulting from disposing, on the leading vertical edges of a central electronic unit, such as a television set, in hinged relationship thereto, a pair of matching speaker doors, one on each side of the central unit. This is the feature which appellee, commencing some eight years after the Barofsky patent-in-suit was applied for, has so consistently stressed in its advertising of its embodiments of this basic design idea, as being "revolutionary", "unique", etc. (See: Plaintiff's First Request for Admissions, Exh. 6, R. 70-120; Barofsky dep. Exhs. C(1)-(34); 13; R. 245). This symmetry was what appellee stressed before the Patent Office in successfully urging allowability of its design patent

application on such embodiment. (See: Defendant's arguments before United States Patent Office contained in file wrapper of defendant's Bentzen patent, D-70,374, included in Supplemental Submission before District Court, R. 387,393-394, 436-439).

The question which should have been considered by the Court is whether on the record presented there was any genuine issue concerning the material fact of whether this principal and dominant feature of the patented design was primarily to serve a functional purpose. Petitioner submits that both the Barofsky depositions* and the Kelso affidavit plainly and unequivocally place this material fact in issue. Thus, Kelso states that at the time petitioner made his invention in 1953, there was no home stereo on the market on a commercial basis, and there was no functional requirement for two separated speakers housed in hinged doors (Kelso affidavit, paragraphs 13, 14 and 15 (R. 300-301)). While the doors shown in the patent drawing were admittedly intended to be speaker housings, petitioner stated, in effect, that he knew nothing of electronics or one wire from another (Barofsky dep. p. 85); nor did he even show any wire connections between the central unit and the doors (Barofsky dep. p. 67). Further, in the design as he

* The Barofsky deposition was submitted by appellee in support of its motion for summary judgment before the District Court and was not introduced by petitioner as the majority opinion indicates on page 7.

showed it, the housings were too shallow to accommodate speakers then available in the state of the art (Barofsky dep. p. 74). In arriving at his design, petitioner said it came to him in a flash; he simply had a beautiful vision (Barofsky dep. pp. 68, 81, 85), and attempted to come up with a design which was beautiful (Barofsky dep. p. 75). He unequivocally stated: " * * * The primary purpose of my doors was appearances, commercially attractive appearances." (Barofsky dep. p. 68).

These factual statements are clearly contradictory to, and inconsistent with, any assertion that the symmetry and pleasing appearance of the double speaker housings attached to the central cabinet were primarily to serve any functional purpose. When the electronic art subsequently developed shallow speakers which could fit in speaker doors, as shown in the patent drawing, and home stereo which rendered it desirable to have detachable hinged speakers to give better stereo effect, petitioner's design was found to be adaptable to fulfill such functional purposes; but the portions of the Barofsky deposition and Kelso affidavit cited above clearly place in issue the allegation that the symmetrical design as well as all other features were dictated primarily by functional requirements.

In this state of the record, petitioner submits that the majority of the Court committed a serious and most prejudicial error in disregarding all such evidence so raising a

genuine issue of material fact. Such disregard appears to be consummated on page 7 of the majority opinion by erroneously equating Barofsky's failure to deny that each of the features of his design also serves a functional purpose and the fact that the other exhibits fail to refute "the functional purposes attributable to the dominant features of the design as disclosed by the patent drawing", with an admission that the primary purposes of all of the design features were functional and not ornamental. Petitioner submits that this constitutes a misinterpretation of the evidence of record.

What is especially disturbing to petitioner's counsel about the majority opinion is that the particular point upon the basis of which the majority has thus affirmed the summary judgment of the District Court was one which was only incidentally discussed in petitioner's main brief and not really discussed at all in oral argument before this Court. Appellee's brief did not clearly negate the existence of the issue of fact mentioned above, but on the contrary, on page 22, implicitly acknowledged the existence of the issue of fact as to whether the features of the design were primarily for functional purposes. Consequently, petitioner had nothing in this area to answer in its reply brief. In this connection, it is particularly significant that before the District Court appellee was apparently so dubious concerning whether a genuine issue was presented as to that material fact by petitioner's specification thereof (R. 289), that appellee offered to delete defense

(c) of its Motion for Summary Judgment and §§ 7 and 9 of its memorandum "if the Court feels that there is any question of fact raised thereby". (R. 351).

The principal points orally argued, according to petitioner's counsel's notes, were non-obviousness under §103 of Title 35 and whether the design was pleasing enough to the eye to be ornamental in any sense.

Thus, the design patent procured by petitioner, an individual inventor, without the aid of patent counsel, has not only been destroyed summarily without his having had his day in Court, but such summary destruction has been affirmed by the majority of this Court on a ground which was never really argued in the briefs or orally before this Court. Petitioner respectfully submits that this result is most inequitable and unjust.

Petitioner suggests that in the circumstances and because of the importance to patentees of views of this Court respecting the granting of summary judgments, rehearing be granted before the Court sitting en banc.

DATED: June 10, 1968.

SMYTH, ROSTON & PAVITT,
WILLIAM H. PAVITT, JR.,
CHARLES H. SCHWARTZ

By

William H. Pavitt, Jr.
Attorneys for Petitioner (Appellant).

CERTIFICATE

I certify that, in connection with the preparation of this Petition, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Petition is in full compliance with those rules.

William H. Pavitt, Jr.

CERTIFICATE OF SERVICE

I hereby certify that the attached PETITION FOR RECONSIDERATION was this day served upon counsel for Appellee by mailing, postage prepaid, copies thereof to said counsel at the offices of said counsel, Harris, Kiech, Russell & Kern, 417 South Hill Street, Suite 900, Los Angeles, California 90013.

DATED: June 12, 1968

William H. Pavitt, Jr.

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JAYCOX SANITARY SERVICE OF GARDEN GROVE, INC.,
and
JAYCOX SANITARY SERVICE OF ANAHEIM, INC.,

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ited States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,416

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JAYCOX SANITARY SERVICE OF GARDEN GROVE, INC.,

and

JAYCOX SANITARY SERVICE OF ANAHEIM, INC.,

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) ¹ for enforcement of its order issued against repondent on

¹ The pertinent provisions of the Act are set forth in the Appendix to this brief.

October 27, 1966. The Board's decision and order (R. 22-38, 44-49)² are reported at 161 NLRB No. 34. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Anaheim, California, where respondent is engaged in the business of trash and garbage collection and disposal under contracts with certain municipalities.³

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that respondent violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union⁴ which represented a majority of its employees in an appropriate unit and by changing the wages and working conditions of these employees without notifying and bargaining with the Union. The Board also found that respondent violated Section 8(a) (3) and (1) of the Act by rescinding all bonuses

² References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. References designated "GCX" and "RX" are to the General Counsel's and respondent's exhibits, respectively. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

³ For the purposes of the Act, respondent is a single employer consisting of two integrated corporations — Jaycox Sanitary Service of Garden Grove, Inc. and Jaycox Sanitary Service of Anaheim, Inc. The corporations have common ownership and management, offices, yard facilities, and trucking equipment. (R. 11-12, 17-18, 23; Tr. 880) No jurisdictional issue is presented.

⁴ Package & General Utility Drivers, Local Union No. 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

and vacations which striking employees had earned prior to an unfair labor practice strike, by requiring strikers to revoke their union membership as a condition of reinstatement, and by refusing to reinstate a striker to his former position upon an unconditional application to return to work. Further, the Board found that respondent violated Section 8(a) (1) of the Act by threatening employees with loss of their jobs if they continued to support the Union and by unlawfully interrogating employees about their union affiliation, activities, and sympathies. The following are the facts upon which these findings are based.

**A. The employees strike and designate
the Union as their collective bargain-
ing representative**

On the morning of April 5, 1965,⁵ approximately 65 drivers and swampers (assistants to the drivers) arrived at respondent's yard⁶ and discussed among themselves their dissatisfaction with the then current wage rates and their concern over a rumor concerning route changes (R. 24; Tr. 273-274, 277, 330, 345-346, 566, 586, 985). Thereafter, the employees asked General Foreman Guerena and Manager Raul Rangel for a raise of \$15 a week and for a commitment that there would be no increase in the number of stops on the various routes (R. 24; Tr. 277, 330-331). Rangel offered the men an immediate increase of \$5 a week, which the employees rejected (R. 24; Tr. 279).

⁵ Unless otherwise indicated, all the events herein occurred during 1965.

⁶ Respondent employs approximately 70-75 drivers and swampers and concedes that a unit of such employees is appropriate (R. 24; Tr. 987-988, 1256-1257).

Rangel then told the men either to accept the raise and go to work or to leave the yard (R. 24; Tr. 331). The employees chose to leave but waited outside the gate for Warren Jaycox, respondent's owner (R. 24; Tr. 331). When he arrived, Jaycox listened to the men and Guereña instructed them to select one spokesman for the Garden Grove area and another for the Anaheim area (R. 24; Tr. 333). The employees picked John Nieto and Joe "Blackie" Diaz to confer with Jaycox (R. 24; Tr. 575-576). In his office, Jaycox told these spokesmen that he would grant the employees an immediate increase of \$5 a week and promised that, after adjusting the routes in two weeks or a month, he would give the employees an additional \$10 a week (R. 25; Tr. 609, 1100, 1171-1172). When this offer was repeated to the employees assembled outside the gate they rejected it (R. 25; Tr. 574, 610-611, 1170, 1172, 1196).

The employees then decided that they needed a union to represent them and that they should go to the Teamsters Hall in Orange (R. 25; Tr. 334-335). The 64-66 employees thereupon got into their cars and drove there (R. 25; Tr. 37a, 335, 345-347, 767). At the hall, the men spoke to representatives of Teamsters Local 235 who informed them that Local 396 in Los Angeles had jurisdiction over trash truckdrivers (R. 25; Tr. 53, 61, 517). When asked if they wanted that local, the Union herein, to represent them, the employees unanimously answered in the affirmative (R. 25; Tr. 104). Thereafter, 64 employees signed cards designating the Union as their collective bargaining representative (R. 25; Tr. 164, 767).⁷

⁷ Although the cards were those normally used by Local 235, the employees signing cards were told and understood that they were designating Local 396 (R. 25; Tr. 81-82, 105-106, 335-337).

While the employees were filling out their cards, Kelly Drake, a representative of Local 235, telephoned to Los Angeles and told John Drobish, the president of the Union, that respondent's employees were at the Teamsters Hall in Orange and that they wanted the Union to represent them (R. 25; Tr. 38, 158). Drake asked Drobish to come and address the employees (R. 25; Tr. 39, 158). Drobish agreed to leave for Orange immediately (R. 25; Tr. 158). Before departing from Los Angeles, Drobish telephoned Jaycox and told him that the Union represented his employees (R. 26; Tr. 158-159). Jaycox turned the phone over to Adam Schleining, an employer engaged in the trash collection business who had a contract with the Union (R. 26; Tr. 159, 673, 676-677). When Schleining took the phone from Jaycox, he asked Drobish to visit respondent's office to discuss the situation (R. 26; Tr. 159-160).

Drake also called Jaycox, informed him that the employees were at the Teamsters Hall, and asked if Jaycox wanted the men to return to work (R. 25; Tr. 57-58, 886). Jaycox told Drake that he did (R. 25; Tr. 58). Drake then returned to the meeting, collected the cards, and told the men that the Union's president would speak to them shortly and that Jaycox wanted them to go back to work (R. 25; Tr. 81). The employees agreed to return to their jobs (R. 25; Tr. 81, 351-352, 520). The men and two Teamsters representatives, Robinson and Brown, went to respondent's yard where the representatives requested Jaycox to put the men to work as he had said he would do (R. 25-26; Tr. 123-125, 142-143). Jaycox replied that it was quite late and he doubted that respondent would make any collections of trash that day (R. 26; Tr. 143). Brown told Jaycox that the employees had signed up with the Union and that a representative of the Union would arrive at respondent's office presently (R. 26; Tr. 143). When Brown asked Jaycox if he would deal with the Union, Jaycox rejoined that he did

not know what he would do and that he would check with his associates in the trash business before taking any action (R. 26; Tr. 143). Jaycox also stated that some of these associates were now on the way to his office and that he thought he would call a meeting to discuss the matter with his employees (R. 26; Tr. 144). Brown cautioned him that if he conducted such a meeting without a representative of the Union present, it might result in the filing of unfair labor practice charges with the Board (R. 26; Tr. 144).

**B. Respondent refuses to recognize the
Union and attempts to break the strike
and undermine the Union's support**

After Drobish arrived at respondent's yard, he instructed the employees to return to the Teamsters Hall while he talked with Jaycox (R. 26; Tr. 160-161, 264). In respondent's office, Drobish met Jaycox and Schleining, who was assisting Jaycox in his dealings with the Union (R. 26; Tr. 161). After a brief discussion, Schleining told Drobish that Jaycox was not yet ready to talk about anything and that Drobish should come back that afternoon (R. 26; Tr. 161).

At the Teamsters Hall, Drobish accepted the 64 cards, which had been signed, and addressed the 66 employees present, telling them, *inter alia*, that he had a two o' clock appointment with Jaycox that afternoon (R. 26-27; Tr. 83, 163-166, 846). He asked the employees to return to the hall about 3:30 p.m. for a report on that meeting (R. 27; Tr. 166).

When Drobish entered respondent's office at the scheduled time, the receptionist told him that Jaycox was in a conference and could not see him (R. 27; Tr. 166-167, 221-222). In response to Drobish's request that someone come out and speak to him, Schleining appeared and told him that they were having a meeting of "the Association"⁸ and that Jaycox was not ready to discuss anything at that point (R. 27; Tr. 167, 222). Schleining told Drobish: "[W]e will contact you later." (R. 27; Tr. 167, 222).

Drobish returned to the Teamsters Hall in Orange where he again met with the employees (R. 27; Tr. 168). He told them that Jaycox had determined not to see him and instructed the employees to report to respondent's yard at their regular time the following morning (R. 27; Tr. 169-171). He also instructed them to begin picketing if respondent attempted to make collections using other workers (R. 27; Tr. 171).

On the next day, April 6, and thereafter, respondent operated its business with men furnished by members of the Association (R. 28; Tr. 790-794, 1247-1248). As a result, respondent's employees began picketing on April 6, bearing signs which read: "JAYCOX UNFAIR TO TEAMSTERS LOCAL 396" (R. 28; Tr. 781). This picketing continued until the afternoon of April 14, when all but four or five employees had returned to work (R. 28; Tr. 194, 564, 781).

⁸ The Orange County Rubbish Disposal Association, a group of owner-operators in the trash collection and disposal business in Orange County, California, which will be referred to herein as the Association.

On Wednesday, April 7, Jaycox asked Schleining to arrange a meeting with the Union (R. 28; Tr. 696). Pursuant to this request, Schleining spoke with Union Representative Raasch, who had charge of the picket line, and the two agreed that Jaycox and representatives of the Union would meet at Schleining's office on Friday afternoon (R. 28; Tr. 697). Later, Jaycox told Schleining that the other members of the Association had learned of the scheduled meeting and that he wanted to call it off so as not to antagonize the members of the Association who were lending him men and equipment (R. 29; Tr. 698). Schleining telephoned Raasch and rescheduled the meeting for Saturday at the Union's office in Los Angeles (R. 29; Tr. 174, 698-699).

On Thursday, April 8, Manager Raul Rangel told the picketing employees that Jaycox wanted them to return to work and was willing to give them the \$15 increase in their weekly wages which they had requested on April 5 (R. 28; Tr. 303). He promised an immediate increase of \$5 and that after a month Jaycox would grant an additional \$10 (R. 28; Tr. 303). The following day was payday and the strikers went into respondent's office to collect their checks (R. 28; Tr. 613-614). When employees Nieto and Diaz appeared in the office, another employer, Taormina of Anaheim Disposal Co., called them over (R. 28; Tr. 614). He asked them what the Union was doing for them and whether its effort were proving successful (R. 28; Tr. 614). Taormina then asked: "[W]hy don't you have a talk with Jaycox, get something straightened out?" (R. 28; Tr. 614). At that point, General Manager Rangel entered the office and Taormina told him that Nieto and Diaz wanted to meet with Jaycox (R. 28; Tr. 614-615). Rangel replied that this could be arranged and Taormina suggested that they meet at the Wonder Bowl, a bowling alley near the office (R. 28-29; Tr. 615).

~~On April 9, employees Diaz, Nieto, Salazar, Bill, and Palma met at the Wonder Bowl with Jaycox, Rangel, Robert Faust~~

On April 9, employees Diaz, Nieto, Salazar, Bill, and Palma met at the Wonder Bowl with Jaycox, Rangel, Robert Faust (an attorney for Jaycox), Taormina, and Trulis of Garden Grove Disposal Co. (R. 29; Tr. 527-529, 616-618). Jaycox offered the men an immediate raise of \$5 a week and promised that their full pay demands would be satisfied in the immediate future (R. 29; Tr. 532, 619). The employees told Jaycox that all the men had signed cards at the Teamsters Hall and Jaycox asked them if they knew what they had signed (R. 29; Tr. 621, 1146). Several employer-representatives expressed interest in the cards and one asked if they would "hold up in court" (R. 29; Tr. 533, 621-622, 1108-1109). Faust asked the employees to procure a card for him so that he could determine if it was "worth anything" (R. 29; Tr. 534-535, 1146-1147). An employee told Jaycox that the Union had informed the strikers that Drobish had a meeting with Jaycox arranged for that Saturday (R. 29; Tr. 535). Jaycox asserted that he had never received a call from the Union and had never been asked to confer with it (R. 29; Tr. 535, 622-623). To support his denial that there was a meeting scheduled for Saturday, Jaycox said he would be at respondent's yard at the time of the supposed conference with the Union and would address the assembled pickets (R. 29; Tr. 535-536, 1113).

On Saturday, April 10, when Schleining arrived at respondent's office to go with Jaycox to Los Angeles to meet with the Union, Jaycox told him that the meeting was postponed because members of the Association had learned of it and they were supplying him with workers (R. 29; Tr. 176, 700-702). Schleining then reported to Union Representative Raasch that there would be no meeting that day (R. 29; Tr. 176, 701). Jaycox also told Schleining that he could see no advantage in meeting with the Union because "we have the situation pretty well under control" (R. 29; Tr. 702). Accordingly, Schleining made no further attempts to arrange a meeting between Jaycox and the Union (R. 29; Tr. 701, 707).

At the time of his appointment with the Union on April 10, Jaycox, accompanied by three other disposal company operators in the area, walked out to the men on the picket line (R. 29; Tr. 550, 612-613, 629-630, 805-810, 1113). He told the assembled employees that he would grant them a \$5 weekly increase immediately and another \$10 increase as soon as the routes were adjusted and that the employees could come back to work on Monday (R. 29-30; Tr. 631, 810, 963-964, 1152). Raasch countered this move by telling the pickets that there would be a union meeting the next day (R. 30; Tr. 811, 967).

The following morning, approximately 50 to 55 employees attended a meeting at the Teamsters Hall (R. 30; Tr. 206-207, 814-815, 968). The employees voted to continue picketing for another week and assisted in making out a schedule for picket assignments (R. 30; Tr. 207-210, 813-814). However, many employees expressed doubts about their ability to withstand financially another week of striking (R. 30; Tr. 588). That evening, employees Guevara and Diaz were at the latter's home when Fonseca one of their co-workers arrived at the house (R. 30; Tr. 368-369, 414, 424). The men discussed the subject of returning to work and Fonseca proposed that they visit the employees and poll them to determine how many wanted to go back to work on the terms that Jaycox had offered (R. 30; Tr. 368-369). Guevara and Fonseca then got into the truck and went to approximately 25 employees (R. 30; Tr. 370, 419, 421). Of those questioned, about 21 said they wished to return to work (R. 30; Tr. 370, 416, 429). Thereupon, Diaz telephoned Jaycox and arranged another meeting at the Wonder Bowl for that evening (R. 30; Tr. 370-371, 422-423).

At this meeting, Jaycox put in writing his offer of a \$5 weekly increase immediately and a \$10 weekly increase when

the routes were adjusted (R. 30; Tr. 372, 425, 431). In Jaycox's presence, Taormina requested the employees to sign printed forms revoking their authorizations of the union as collective bargaining representative (R. 30-31; Tr. 372-374, 426-427).

The meeting concluded and Jaycox gave the group of employees \$25 for gas to be used when they went to the homes of the various employees to tell them of his offer and his desire that they return to their jobs (R. 31; Tr. 375-376). On Monday morning April 12, approximately 38 employees reported for work (R. 31; Tr. 1093-1094). Rangel and Jaycox told each of the men that they had to sign the authorization revocation form before he could be reinstated (R. 31; Tr. 377-379, 433-434, 488-489, 555-556, 1044-1049, 1237-1238, GCX 3). Employees reporting for work on ensuing days also had to sign these forms (R. 31; Tr. 304, 307-309, 1158, GCX 3).

C. Respondent threatens employees with loss of their jobs if the Union should become their bargaining representative

Several weeks after the end of the strike, all the employees gathered together with General Manager Rangel and Foremen Vargas, Dominguez and Guerena (R. 31; Tr. 381-382, 635-636, 930-932). Guerena told the employees that he knew they still wanted the Union to represent them and that Jaycox had said that, if they wanted the Union, they could have it but they were going to lose money by such a move and would hurt themselves (R. 31; Tr. 382). Guerena reported that Jaycox had told him that, if the Union became the employees' bargaining agent and the Company signed a contract with it, respondent would have to require that all employees, especially drivers, speak and write English and that those who could not

do so would be discharged (R. 31; Tr. 382-383, 559, 929-930). Guerena said that all drivers would have to speak and write English because sometimes people from whom they collected trash talked to them about special work (R. 31; Tr. 382-383, 637-638). Guerena also said that, if the employees wanted the Union, they should look for other jobs for respondent would have to hire men who spoke English (R. 31; Tr. 383). Guerena displayed several union cards, said that he had had experience with unions, that they had never helped him, and that anyone who joined a union was throwing his money away (R. 31; Tr. 560, 636-637, 930).

D. Respondent rescinds the bonuses and vacations employees had earned prior to the strike and unilaterally changes the routes and wages of the returned strikers

At a second meeting of the employees after the strike, Jaycox addressed those present and stated that all who had returned to work must start as new employees (R. 32; Tr. 323, 383-386, 560, 639, 932-934). He said that because he had lost so much money during the strike, he would not be able to pay the bonuses and vacation pay which the men had earned before the strike and that he was cancelling them (R. 32; Tr. 323, 384-388, 932-934, 1233-1234).

After the strikers returned to work, respondent paid the drivers \$90 a week and the swampers \$80 a week (R. 32; Tr. 956). Before the strike, their wages had been \$85 a week and \$75 a week, respectively (R. 32; Tr. 956). On May 10, respondent adjusted the routes and, thereafter, the drivers' pay was raised to \$100 a week and the swampers' pay to \$90 a week (R. 32; Tr. 956). These changes in routes and wages were effected without notifying or bargaining with the Union (R. 32; Tr. 642-644, 1159).

E. Respondent refuses to reinstate Paul Infante

At the time of the strike, Infante had worked for respondent for approximately six years (R. 32; Tr. 712). He had "a regular route" with a "truck assigned to him" for over a year prior to the strike (R. 32; Tr. 747-748).⁹ April 5, he joined with the other employees, signed a card, and picketed (R. 32; Tr. 713-714).

When his fellow employees returned to work during the week of April 12 Infante decided that he would not go back (R. 32; Tr. 727, 729, 735-736, 744). As he testified: "It just did not occur to me to go back right there and then" (R. 32; Tr. 727).

On April 29, Infante sought reinstatement (R. 33; Tr. 720-722, 748-749). He spoke to his foreman and asked to be returned to work (R. 33; Tr. 740, 748-749). The foreman told him that there were no openings then (R. 33; Tr. 724, 748).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that respondent violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union and by changing the wages

⁹Among respondent's employees, there are regular drivers and swamper, i.e., those employees who compose a crew and work the same truck on the same route (R. 33; Tr. 380, 389, 762, 900, 1138-1139). There are also men who are required on certain days as replacements (R. 33; Tr. 389, 1138-1139).

and working conditions of its employees without notifying and bargaining with the Union. The Board also found that respondent violated Section 8(a) (3) and (l) of the Act by rescinding all bonuses and vacations that striking employees had earned prior to the unfair labor practice strike, by requiring strikers to revoke their authorizations of the Union as a condition of reinstatement, and by refusing to reinstate a striker to his former position upon an unconditional application to return to work. Further, the Board found that respondent violated Section 8(a) (l) of the Act by threatening employees with loss of their jobs if they continued to support the Union and by interrogating employees about their union sympathies and activities (R. 33-37, 44-46).

The Board ordered respondent to cease and desist from the unfair labor practices found and from in any other manner interfering with restraining or coercing its employees in the exercise of their statutory rights. Affirmatively, the order requires respondent to bargain with the Union on request and to incorporate any understanding reached in a signed agreement and to reinstate Paul Infante with backpay. The order also requires respondent to reinstitute the systems of bonuses and vacation pay established before the strike and to make employees whole for any financial loss suffered as a result of respondent's discriminatory discontinuance of such systems. In addition, respondent must post appropriate notices (R. 37-38, 46-49).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FIND- INGS THAT RESPONDENT VIOLATED SECTION 8(a) (5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION AND BY CHANGING WAGES AND WORKING CONDITIONS OF THE EMPLOYEES WITHOUT NOTIFYING AND BARGAINING WITH THE UNION

Section 8(a) (5) of the Act requires an employer "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." This latter section provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining. * * *" Thus, where a union has obtained authorization cards signed by a majority of the employees in an appropriate unit, designating the union as their bargaining representative, an employer violates Section 8(a) (5) of the Act if, absent a good-faith doubt of the union's majority status he refuses a request to recognize and bargain with the Union, in order to gain time within which to undermine the union's majority support. *N.L.R.B. v. Security Plating Company*, 356 F. 2d 725, 726-727 (C.A. 9); *Master Transmission Rebuilding Corp. v. N.L.R.B.* 373, F. 2d 402 (C.A. 9), enforcing 155 NLRB 364, 367-369; *Snow v. N.L.R.B.*, 308 F. 2d 687, 691 (C.A. 9); *N.L.R.B. v. Scott & Scott*, 245 F. 2d 926, 928 (C.A. 9); *N.L.R.B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 263 (C.A. 9), cert. denied, 348 U.S. 829; *N.L.R.B. v. Geigy*, 211 F. 2d 553, 556 (C.A. 9), cert denied, 348 U.S. 821.

The record here shows that on April 5, the date the Union requested recognition as bargaining agent, it represented 64 of the approximately 70-75 employees in the unit sought (R. 33; Tr. 167, 767, 1256-1257). When the Union made its request, respondent did not question the Union's majority or the appropriateness of the unit but, as shown above pp. 6-12, delayed recognition and bargaining while it undertook to defeat the Union. We submit that respondent's unlawful course of conduct demonstrates beyond question its lack of good faith doubt of the Union's majority status and, therefore, that the Board's finding that respondent violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union is entitled to affirmance. See cases cited *supra*.

Moreover, since the Union was the designated representative of the unit employees, respondent was under a duty to deal exclusively with the Union regarding the wages and conditions of employment of those employees. *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 683-684. By changing wages and working conditions without notifying and bargaining with the Union, respondent derogated its bargaining obligation and further violated Section 8 (a) (5) and (1) of the Act. *N.L.R.B. v. Katz*, 369 U.S. 736, 743 and 568, 572 (C.A. 9); *N.L.R.B. v. Yutana Barge Lines, Inc.*, 315 F. 2d 524, 529-530 (C.A. 9); *Carpinteria Lemon Association v. N.L.R.B.*, 240 F. 2d 554, 557 (C.A. 9), cert. denied, 354 U.S. 909.

Record

II. SUBSTANTIAL EVIDENCE ON THE ~~BOARD~~
 AS A WHOLE SUPPORTS THE BOARD'S
 FINDINGS THAT RESPONDENT VIOLATED
 SECTION 8(a) (3) AND (1) OF THE ACT BY
 CONDITIONING REINSTATEMENT OF
 STRIKING EMPLOYEES UPON THEIR ABAN-
 DONMENT OF THE UNION AND BY REFUSING
 TO PAY ESTABLISHED BONUSES AND
 VACATION PAY TO THOSE EMPLOYEES

Section 8(a) (1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," which includes the right to strike.¹⁰ Section 8(a) (3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term of condition of employment to * * * discourage membership in any labor organization," which includes discouraging participation in concerted activities.¹¹

Respondent's insistence that the striking employees abandon the Union as a condition of their reinstatement is a notoriously flagrant unfair labor practice. The illegality under the Act of imposing any such condition was clearly established in *N.L.R.B. v. Mackay Radio & Telephone Co.*, 304 U.S.333, 346-347, and

¹⁰ The act's solicitude for the right to strike is further shown by Section 13, which provides that: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *."

¹¹ *National Labor Relations Board v. Erie Resistor Corp.*, 373 U.S. 221; *Radio Officers' v. N.L.R.B.*, 347 U.S. 17, 39-40.

is not open to challenge. Accordingly, the Board was justified in finding that such action constituted a violation of Section 8(a) (3) and (1) of the Act.

It is also well established that an employer violates these statutory provisions by denying vacation or bonus benefits to employees because they went on strike. *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26; *N.L.R.B. v. Wheeling Pipe Line*, 229 F. 2d 391, 394-395 (C.A. 8). As shown above p. 12, respondent treated all returning strikers as new employees and denied them bonuses and vacation pay which they had earned prior to the strike.

The record readily supports the inference that respondent changed these terms and conditions of the strikers' employment to retaliate against them for engaging in a protected concerted activity. However, no proof of illegal motivation need be shown in a case like this where on its face, employer conduct is inherently discriminatory and destructive of employee rights. *N.L.R.B., v. Great Dane Trailers, Inc.*, 388 U.S. 26; 33-34; *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 228-231. The cancellation of bonuses and vacation pay already accrued to the strikers carried its own indicia of illegality. Respondent merely asserted that economic losses resulting from the strike motivated such cancellation, but it did not sustain its burden of proving sufficient justification for its patently discriminatory conduct. *Great Dane Trailers, supra*, 388 U.S. at 34. Accordingly, the Board was warranted in finding that respondent violated Section 8(a) (3) and (1) of the Act by denying returning strikers their bonuses and vacation pay.

III. SUBSTANTIAL EVIDENCE ON THE RECORD
AS A WHOLE SUPPORTS THE BOARD'S
FINDING THAT RESPONDENT VIOLATED
SECTION 8(a) (1) OF THE ACT BY THREAT-
ENING AND INTERROGATING ITS EMPLOYEES

As shown in the Statement (pp. 11-12), respondent threatened its employees, many of whom did not speak or write English (R. 31; Tr. 559, 929), that, if the Union became their bargaining agent, employees, especially the drivers, would have to speak and write English (R. 31; Tr. 382-383, 559, 929-930). Thus, it warned the employees that, if they wanted union representation, they should look for other jobs because respondent would be required to hire men who knew English (R. 31; Tr. 383). Such open threats of reprisal are clearly violative of Section 8(a) (1) of the Act. *N.L.R.B. v. Geigy Company*, 211 F. 2d 533, 557 (C.A. 9), cert. denied, 348 U.S. 821; *N.L.R.B. v. Idaho Egg Producers, Inc.*, 229 F.2d 821, 823 (C.A. 9); *N.L.R.B. v. West Coast Casket Co.*, 205 F.2d 902, 904-905 (C.A. 9); *N.L.R.B. v. C. Britton Co.*, 352 F.2d 797, 798 (C.A. 9); *N.L.R.B. v. Ambrose Distributing Co.*, 358 F.2d 319, 320 (C.A. 9), cert. denied, 385 U.S. 838.

Likewise unlawful were respondent's interrogations on April 9 concerning the cards employees had signed at the Teamsters Hall. Employees were asked if they knew what they had signed and were asked to procure a card so that respondent's counsel could see if it was "worth anything" (R. 29; Tr. 533-535, 621-622, 1108-1109, 1146-1147). At the same meeting, respondent unilaterally offered the employees certain wage increases. Such interrogation, occurring in a context of union hostility and efforts to undermine the Union's support was violative of Section 8(a) (1) of the Act. See, for example, *N.L.R.B. v. Griggs Equip., Inc.*, 307 F. 2d 275, 277-278 (C.A. 5); *N.L.R.B. v. Monroe Feed Store*, 237 F. 2d 116 (C.A. 9), enforcing 110 NLRB 630.

IV. SUBSTANTIAL EVIDENCE ON THE RECORD
AS A WHOLE SUPPORTS THE BOARD'S
FINDING THAT RESPONDENT VIOLATED
SECTION 8(a) (3) AND (1) OF THE ACT BY
REFUSING TO REINSTATE STRIKER PAUL
INFANTE

Although the strike was precipitated by a wage dispute, as the Board found it was converted into an unfair labor practice strike and prolonged by respondent's subsequent illegal conduct. See *N.L.R.B. v. Giustina Bros. Lumber Co.*, 253 F. 2d 371, 374 (C.A. 9). The strikers thereupon became unfair practice strikers and respondent was obliged to reinstate them on an unconditional application, discharging, if necessary, replacements hired after it had engaged in the unfair labor practices. *Ibid.*; *Snow v. N.L.R.B.*, 308 F. 2d 687, 695 (C.A. 9). Thus, respondent's refusal to comply with Infante's request for reinstatement constituted, as the Board found (R. 34-35, 45), discrimination in violation of Section 8(a) (3) and (1) of the Act. *Mastro Plastics v. N.L.R.B.*, 350 U.S. 270, 278; *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 907-908 (C.A. 9).

Respondent contends that it did not refuse to reemploy Infante, but rather that Infante applied for work after the trucks had been dispatched on the morning of April 29, and that his foreman told him nothing was available that day. However, it is clear from the record that Infante was a regular and not an extra driver working on a day-to-day basis (R. 32; Tr. 747-748). Contrary to respondent's assertions, all employees are not dispatched on a first-come basis; rather, senior employees have regular trucks and routes assigned to them and Infante was one of those employees (R. 33; Tr. 380, 389, 747-748, 762, 900, 1138-1139). It is also clear from the record that Infante applied for his old job but was told flatly

that there were no openings; nor was he offered any prospect of future employment (R. 33; Tr. 718, 720-721, 724, 748-749). The fact, however, that Infante could not be fitted into respondent's work schedule on April 29, and that there was no work for him that day, did not relieve respondent of the obligation to reemploy him in response to his request. "This basic right to jobs cannot depend on job availability as of the moment when the applications are filed. The right to reinstatement does not depend upon technicalities relating to application . . . If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement." *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375 ~~U.S.~~

Respondent further contends that Infante chose not to return to work at the conclusion of the strike, and hence, that his application for reinstatement was untimely. The record establishes that Infante continued to picket after most of his co-workers abandoned the strike (R. 34; Tr. 734-735) and that he did not seek reinstatement until two weeks after the strike ended (R. 34; Tr. 747-748). However, unfair labor practice strikers may apply for reinstatement at any time within a reasonable period after the conclusion of a strike, and what is a reasonable period depends upon the circumstances of the case. *E.A. Laboratories, Inc.*, 86 NLRB 711, 713-714, enforced 188 F. 2d 885 (C.A. 2), cert. denied, 342 U.S. 871; *J.H. Rutter-Rex Manufacturing Company* 158 NLRB 1414, 1543; *R.J. Oil & Regining Co., Inc.*, 108 NLRB 641, 684-685; *Crosby Chemical, Inc.*, 105 NLRB 152, 154. Here, respondent induced the employees to abandon their strike through the commission of unfair labor practices and then unlawfully demanded that returning strikers revoke their union authorizations. We submit that under such circumstances Infante's unconditional request for reinstatement approximately two weeks after the other employees capitulated and abandoned the strike was not untimely.

V. NO ASPECT OF THE CASE IS MOOT AND
THE BOARD'S ORDER IS IN ALL RESPECTS
VALID

Before the Board, respondent contended that all aspects of this case, other than the Infante matter, were effectively resolved by the parties through the collective bargaining process and were, therefore, moot.¹² Accordingly, it urged the Board not to issue an order requiring respondent to bargain with the Union and to remedy the other unfair labor practices. The Board rejected the contention and issued an order requiring respondent to remedy all the violations of the Act.

It has long been recognized, and recently was reaffirmed in *Fibreboard Paper Products Corp. v. N.L.R.B.* 379 U. S. 203, 215-216, that the Board's remedial power is a broad discretionary one, subject only to limited judicial review. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. "The relation of remedy to policy is peculiarly a matter for administrative competence . . ." *Phelps Dodge Corp. v. N.L.R.B.*, 313, U.S. 177, 194. The Board's order will not ordinarily be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540. We submit that no such showing has been made in this case and that the Board's order is valid and proper.

It was recognized by this Court in *Pacific Coast Association of Pulp and Paper Mfrs. v. N.L.R.B.*, 304 F. 2d 760,765

¹² A stipulation, which was executed by attorneys for respondent and the Union and filed with the Board, relates that respondent recognized the Union and entered into a five-year contract with it, effective April 16, 1966.

that a pending unfair labor practice proceeding is not rendered moot merely because the employer and union have settled some of the issues in dispute by means of collective bargaining. In that case, as here, the employee representatives had filed the charges against the employer, but the Court, stressing the public, as opposed to private rights involved in these cases, stated, "This is a proceeding by the Board, not the Unions." See also, *Local 1976, Carpenters Union v. N.L.R.B.*, 357 U.S. 93, 97 n. 2; *McQuay-Norris Mfg. Co. v. N.L.R.B.*, 116 F.2d 748, 751 (C.A. 7), cert. denied, 313 U.S. 565. *N.L.R.B. v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 271; *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 225, n. 7; *N.L.R.B. v. Pool Manufacturing Co.*, 339 U.S. 577, 581; *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395; 399 n. 4; *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567.

Under all the circumstances of this case, the Board was justified in concluding that it was desirable to add the sanctions of an order to the agreement the parties had reached, and that the various other violations of the Act, which respondent contended were rendered moot by such agreement, were not in fact remedied but warranted issuance of the instant order.

CONCLUSION

For the reasons stated, it is respectfully requested that a decree issue enforcing the Board's order in full.

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March 1968

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallett-Prevost
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

*

*

*

LIMITATIONS

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

APPENDIX B

The following table of exhibits is presented pursuant to Rule 18(2)(f) of the Rules of the Court. References are to the typewritten transcript of testimony ("Tr."):

GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
1(a) through 1(r)	7	7	7
2-1 through 2-67	42-47	51	
2-18 and 2-61			339
2-58			345
2-57, 2-60, 2-61, 2-63, 2-65			350
2-36			487
2-17 and 2-34			520
2-28			715
2-38			763
2-46			902
2-39			913
2-60			925
2-26			940
2-3 through 2-16, 2-19 through 2-27, 2-29 through 2-33, 2-35, 2-37, 2-38, 2-40 through 2-45, 2-47 through 2-55, 2-59, 2-64, 2-66, and 2-67			997
3	305	490	491

RESPONDENT'S EXHIBITS

1 and 2	1010	1010	1010
3	1014	1019-1020	1020
4 and 5	726*	1264-1265	1265

* Respondent's Exhibits Nos. 4 and 5 were introduced as General Counsel's Exhibits Nos. 4 and 5.

No. 22,416

IN THE

JUN 19 1968

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

JAYCOX SANITARY SERVICE OF GARDEN GROVE, INC.,
and JOYCOX SANITARY SERVICE OF ANAHEIM, INC.,

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board.

BRIEF FOR RESPONDENT.

FILED

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JUN 13 1968

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Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

I.

Statement Regarding All Issues Other Than Reinstatement of Paul Infante.

In the main, Respondent's position regarding all issues has been stated heretofore in its Brief In Support of Exceptions to Trial Examiner's Decision. To facilitate an orderly review, Respondent's position will be restated in this Brief submitted in opposition to the National Labor Relations Board's petition for enforcement of its order.

Respondent and Teamster's Local No. 396 executed a written stipulation on August 3, 1966, which was attached to Respondent's Brief In Support of Exceptions. The contents of said stipulation were as follows:

"IT IS HEREBY STIPULATED by and between the undersigned parties, through their respective attorneys of record, that all issues, charges and matters now pending in the above-entitled matter before the National Labor Relations Board except as provided hereinafter be dismissed. This stipulation is a petition to the National Labor Relations Board to dismiss such issues, charges and matters for the reasons set forth below:

"(1) Since the matter was litigated, the Employer has recognized and bargained collectively with the charging party as the exclusive collective bargaining agent of all the employees within the appropriate unit sought by the charging party. Said recognition and bargaining are evidenced by a contract which went into effect on April 18, 1966. An order to bargain collectively is not, therefore, required.

"(2) It is the position of both the employer and the charging party that all other matters litigated in the above-entitled cause, except the discharge of Paul Infante, have been effectively remedied.

"By this stipulation, the National Labor Relations Board is respectfully petitioned to dismiss all charges except the 8(a)(1) and (3) charge in con-

nection with the aforesaid terminated employee, Paul Infante, before any final order is issued by the Board, and to limit the decision and order of the Board to the issue so excepted.”

Dated: August 3, 1966

NAGEL & REGAN

BY: A. Patrick Nagel /s/

Attorneys for Respondent

BRUNDAGE & HACKLER

BY: L. D. Mathews Jr. /s/

L. D. Mathews Jr.

Attorneys for Local No. 396”

The provisions of this stipulation cover only a small portion of the entire factual background. Even before the trial of the issues, Respondent’s counsel, coming into the case after all the facts constituting unfair labor practices had been committed, became acutely aware that the labor organization in question did in fact at all times material to this proceeding represent the majority of the employees in an appropriate bargaining unit and recommended to Respondent that it recognize the charging labor organization as the collective bargaining agent.

Immediately following the trial of the issues, during which it became quite evident that some of the conduct of Respondent’s agents was violative of the Act, Respondent recognized the charging union as the collective bargaining agent of all employees within the appropriate unit sought by said union.

As the result of extensive negotiations lasting many months, a five-year collective bargaining agreement was executed and became effective April 18, 1966. This was some five months following the trial itself and the execution of said collective bargaining agreement was substantially prior to the issuance of the Trial Examiner's Decision on June 21, 1966.

Aforesaid collective bargaining agreement provided for, *inter alia*, wages, hours and conditions of employment, and disposed of all issues such as vacations and bonuses, which are included in the Order of the Board.

The actions of the parties themselves, as exemplified by the above stipulation, provides a total answer to the dispute and by itself evidences the success of voluntary collective bargaining without interference by the Board.

The Board saw fit, however, to ignore aforesaid stipulation.

As a matter of fact, following the issuance of the Order by the Board, Respondent, with full approval and acquiescence of the charging union, offered to comply with the Board's order in every respect except that portion of the order relating to the reinstatement of Paul Infante. The Board refused this offer on the ground that Respondent would either have to comply with the Board's order in every respect, without exceptions, or the Board would pursue its remedies before this Court for enforcement of the entire order.

The Board's refusal, if not without precedent, is most certainly an exercise in futility which explains to a very considerable extent why parties seeking relief before the Board must wait for years before relief is

obtained, which more often than not comes much too late.

In over-simplified terms, Respondent offered to litigate before this Court only the issue relating to the reinstatement of Paul Infante and agreed to comply in every respect with all other provisions of the Board's offer. This offer was unjustifiably refused. The Board's explanation for this refusal on pages 22 and 23 of its Brief is meaningless and punitive in nature. The Board's order, except as it affects the reinstatement of Paul Infante, is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.

II.

All Aspects of the Case (Except Those Issues Relating to Reinstatement of Paul Infante) Are Now Moot.

None of the cases cited by the Board on pages 22 and 23 of its Brief apply to the facts at bar. Therein, the Board, in support of its contention that no aspect of the case is moot, cited a number of cases. Respondent has reviewed each and every one of those cases and respectfully submits that none of them could arguably apply to the issues in the instant case.

In each and every one of the cases cited, there remained certain areas of disagreement between the employer and the charging labor organization. There is no disagreement here. Furthermore, the issue relating to Paul Infante is divisible and severable from all the others. Each and every one of the striking employees was reinstated following a strike of a short duration and all other issues with which the Board has seen

fit to concern itself, such as vacations and bonuses which at the outset were threatened to be taken away by Respondent, were subsequently resolved to the eminent satisfaction of the charging labor organization and the employees who ratified. A five-year collective bargaining agreement covering all of those issues was executed by the parties on April 18, 1966, and all matters except the Paul Infante matter have been disposed of much more effectively than the Board itself could have done by way of any order.

Since Respondent has effectuated the policies and the intent of the Act by negotiating and resolving all issues except the Paul Infante matter, the Board was not justified in concluding that it is necessary or desirable to add the sanctions of an order to the agreement that the parties had themselves reached. Respondent respectfully submits that the various other violations of the Act were rendered moot by the collective bargaining agreement since these had in fact been remedied.

To require Respondent some two to three years following the execution of the agreement to post notices, for example, that it recognized the union and that it would bargain in good faith, borders on the ludicrous, if not ridiculous. Nor would the employees understand the posting of any order to that effect. Respondent fully understands the nature of public rights as opposed to private rights involved in the cases cited on pages 22 and 23. The common denominator in all of those cases was that the parties had not resolved the pending disputes, which led to filing of unfair labor practices, to the Board's satisfaction. Here, all disputes, except the Paul Infante matter, have been unquestionably resolved.

III.

**Substantial Evidence on the Record as a Whole
Refutes the Board's Finding That Respondent
Violated Section 8 (a) (3) and (1) of the Act
by Refusing to Reinstate Striker Paul Infante.**

In spite of the settlement of the dispute, the parties lack the power to negotiate a disposition of the 8(a) (3) charge and this is the only issue left which was not negotiated and resolved by the parties. Furthermore, there was nothing to negotiate in this regard since employee Paul Infante never made an unconditional offer to return to work and his entire course of conduct demonstrates that he never had any intention of resuming his status of employment in his former position with the Respondent.

The facts against which the 8(a)(3) charge must be viewed are as follows:

1. That Paul Infante was never *discriminatorily* refused any reinstatement to his former status.
2. That Paul Infante never made an unconditional offer to be reinstated.
3. That, if the Board finds that some offer to be reinstated was made by Infante, such offer was conditional and the offer was made belatedly.
4. That Respondent never refused to reinstate Infante.
5. That, should the Court find that reinstatement of Infante is a proper remedy in the instant case, such reinstatement should not be with any back pay penalties.

Stated briefly, the strike at the time it commenced was an "economic" strike. It is clear that when the

employees refused to commence work on the morning of April 5, they commenced striking for economic benefits and, on the record, had not yet made any contact with the union. If it was an economic strike at its outset on April 5th, as Respondent contends, Respondent finds little quarrel with the Trial Examiner's Findings of Fact and Conclusions that at all times thereafter the charging union had been designated exclusive bargaining representative of all employees in the unit sought by the union. It was not until the afternoon of April 5th that agents of the union contacted Respondent, advising that the employees had selected the union to represent them and that the union, for that reason, requested a meeting with Respondent's agent.

Suffice it to say that the striking and picketing continued until the afternoon of Wednesday, April 14th, by which time all but approximately four or five of the company's employees had returned to work [Trial Examiner's Decision, p. 7, lines 7-10 incl. This was stipulated to by counsel for all the parties on the record].

The employee, Paul Infante, and Respondent both testified that for over a year prior to the strike Infante had been a driver on a route.

There is no dispute on the record that *Infante had actual knowledge of the fact that "when the other men went back to work, he decided that he would not go back. As he explained it, 'It just did not occur to me to go back, then and there.'"* (Emphasis added) [Trial Examiner's Decision, p. 11, lines 57-59].

Infante also admitted that he gave an affidavit to a Board agent which contained a statement to the effect that Infante had decided that he would not return to

work even after the others had told him that they were returning, and that the first and only time he reapplied for his job was Wednesday, April 29th, when he spoke to his foreman about 6:30 a.m. This was preceded by a phone call from Infante to his supervisor on April 27th at which time he was told to come in the next morning. This he failed to do [Tr. Vol. V, p. 138, lines 13-19, incl.].

On the record referred to above, it is undisputed that Infante had actual knowledge that all other employees had returned to work, decided he would not go back to work then and there, and that he did not reapply for his job until Wednesday, April 29th, when he spoke to his foreman about 6:30 a.m. It is also undisputed from Infante's own testimony that the supervisor had merely said, "There are no openings right now." Infante himself understood this to mean that all the trucks had already left the Respondent's yard to make their daily pickups and there was no truck available for Infante to drive at that time of the day [Tr. Vol. V, p. 737, lines 8-24, incl.].

Infante further testified that he did not go back to the company and request reinstatement to his job until after he had been informed by an official at the Unemployment Compensation office of the State of California that he was ineligible for such compensation because the other men had gone back to work and he could get his job back if he applied for it. It is undisputed that in the Respondent's operations, there are some drivers and swamper who are assigned to regular routes and there are some who come to the yard each morning for assignment to a truck [Trial Examiner's Decision, p. 12, lines 7-16, incl.].

The Trial Examiner [see his Decision p. 13, lines 26-61 incl., and p. 14, lines 1-17, incl.] makes his observations on the facts surrounding Infante's belated attempt to be reinstated to employment and to the reasons for making such application two weeks later. It is quite obvious from reading the Trial Examiner's editorial comments that he credits Infante with refusing to return to employment even after the others did because Infante "persevered in his determination" and that "Infante did not relish the idea of calling off the strike and returning to the employment of the company." Thereafter, the Trial Examiner charges the company with unfair labor practices, financial pressure, lies and deceit as justification and factors which apparently were relied on by Infante as his reason why he did not return to work. Respondent categorically and vehemently resents those accusations, excepts to them, and further states that on the record borne out by Infante's direct and cross-examination no such justification was ever relied on by Infante at all. The Trial Examiner's diatribe against the Respondent in reference to the fact that some men capitulate quickly while others, "in accord with their character and intelligence may see through these tactics and continue to strike for a longer time, such as Infante," is totally unjustified and finds no basis in the record made at the trial of the issues.

The Court's attention is respectfully called to that portion of the record dealing with the direct and cross-examination of Paul R. Infante [p. 711, to p. 750, lines 18, incl.]. The highlights and salient points brought out in the examination of Infante are as follows:

1. Infante testified that he picketed for about a week and one-half [See Tr. p. 726, lines 14-15].

2. That the last day Infante picketed Respondent's premises was Wednesday the following week, which would be April 14, 1965 [Tr. p. 726, lines 22-25; p. 727, lines 1-6, incl.].

3. Infante knew that the other employees had told him they were returning to work and that, in fact, they had returned to work [Tr. p. 729, lines 9-13, incl.].

4. That the first contact Infante made with Respondent was by way of a telephone conversation he had with Joel, his erstwhile supervisor at Respondent's company, on April 27, 1965, when he called him in the evening of April 27, at which time Joel, in response to Infante's query as to whether he had a job for him, said, "Go early in the morning and he would see what he could do." [See Tr. p. 729, line 24, through p. 730, line 17, incl.].

5. That Infante did not show up on April 28th and did not talk to any agent of Respondent [See Tr. p. 732, lines 11-17, incl.].

6. That Infante made no effort of any kind and at no time made any contact of any nature whatsoever with Respondent following his conversation face to face with aforesaid supervisor on the morning of April 29th; that he got a job with the Yorba Linda Packing House immediately after the 29th [See Tr. p. 723, lines 6-9, incl.]. The inference to be drawn from this was that he had no real interest in returning to work and preferred working elsewhere.

7. That Infante, at no time, relied on any conditions, unlawful or otherwise, which Respondent pur-

portedly was imposing as a condition to reinstate former employees, for his failure to apply for reinstatement, and that he merely had decided on his own not to go back to work. This refutes categorically the Trial Examiner's finding that Infante was continuing his own strike because of Respondent's unfair labor practices, lies and deceptions. As a matter of fact, the record is crystal clear that Infante had no knowledge of the fact that Respondent was purportedly requesting employees to sign a statement revoking the authorization cards previously signed with the charging union as any condition of reinstatement [Tr. p. 729, lines 9-13, incl.].

8. As a follow-up to Infante's motives not to return, the record clearly shows that the return of the other employees to work with Respondent did not change Infante's thinking at all, and that he, "just thought of looking, you know, for another job." [See Tr. p. 736, lines 7-23, incl.] And further that he never showed up at Respondent's offices again because he got another job immediately [See Tr. p. 737, lines 18-23, incl.].

9. That Infante well knew that everybody else was being reinstated as the result of his conversation with an unidentified official in the State Unemployment Compensation offices which caused him to make his contact on the telephone on April 27th and in person on April 29th with Respondent's supervisor [Tr. p. 738, lines 4-12, incl.].

10. That the only motivation for Infante applying or making contact with Respondent on the 29th was the

direct result of being advised that he was no longer eligible for unemployment compensation. [See Tr. p. 740, line 22, through p. 741, line 6, incl.]. In connection with this phase of Infante's testimony on cross-examination, although he makes reference to April 28th in this phase of it, it was made crystal clear that at all other times and thereafter he in fact never saw anyone on the 28th. Infante repeatedly admitted no personal contact had been made between him and respondent on the 28th.

11. The General Counsel's efforts on redirect examination by way of leading questions to have Infante testify that his reasons for not returning to work were because he knew that certain papers had to be signed by the employees failed dismally. In reference to that paper which the employees were signing. Infante testified loud and clear that he did not know the contents or the nature of the paper to be signed and that he, "just heard from the other guys—other guys told me there that it said it would give them a five dollar raise and then when they got more houses to pick up, they would give them the other ten dollars after that." And that he did not remember anything else that the paper contained [See Tr. p. 741, lines 10-26, incl.].

12. Again on redirect examination the Trial Examiner himself examined the witness and asked him once more why he decided not to return to work when the other people were going back, at which time Infante stated, "I just decided that. That is all." [Tr. p. 744, lines 4-10, incl.].

Infante's obvious state of mind was that he could get his job back on the basis of his conversation with the Unemployment Compensation official [Tr. p. 715, line 23, through p. 716, line 2, incl.].

As additional evidence of what transpired on the morning of the 29th, Infante repeatedly testified that he "saw all the trucks go out" [Tr. p. 720, lines 21-22] and that he was told by the supervisor as to his reason why he was not being put to work immediately "because there is no room for you. All the trucks are filled up." (The confusion of what transpired on April 28th is cleared up by the witness when he stated that he had been talking about the 29th and not the 28th because on the 28th he did not have any conversation with Joel.) [Tr. p. 722, lines 12-17, incl.].

Respondent contends, therefore, on the basis of the record that, although Infante knew that all the other employees had returned to work, he made no effort in that direction himself. His efforts of April 27th and 29th were not only too late, they were too confusing and equivocating to constitute an unconditional offer to return. Absent such a timely offer, Respondent's obligations to Infante, if any, terminated.

At best, Infante's contract with the employer on April 27th, and more particularly on the morning of April 29th, can be characterized as showing up belatedly on the morning of the 29th when all the trucks were gone and being told that there was no room for him on any of the trucks *that day*.

Once all the employees except several had returned to work and Infante still continued his picketing, Respondent contends that Infante had constructive as well as actual knowledge that he could have his job back. Thereafter, the responsibility rested on Infante unequivocally to tell Respondent he was ready, willing and able to return to work. He did none of these things.

He waited some thirteen (13) days following the return to work by all other employees before making a phone contact, then showed up two days later when all the trucks had gone out for the day.

His failure to do any of the above things should be considered fatal to any back pay remedy, even if the Court should hold that he was entitled to reinstatement should he desire it.

Also fatal to any remedy is Infante's delay by some fifteen (15) days in applying for reinstatement since he had full knowledge at all times that all the other employees had been put back to work and that his job was available to him at the same time as to the others.

ARGUMENT AND POINTS AND AUTHORITIES.

A. Voluntary Settlement Should Be Honored by the Board.

Respondent contends that the Board should accept the voluntary Stipulation and settlement as a final disposition of all issues raised.

The intent of the Act is to create an environment in which the collective bargaining process is free to reach a result acceptable to all concerned. If this policy is to have any meaning, a duly executed settlement agreement should be honored. (*Jackson Mfg. Co.*, 129 NLRB 460 (1959); *Administrative Decisions of General Counsel*, Nos. SR-743, R-763, SR-472.)

B. Respondent Made an Unequivocal Offer to Re- instate All Striking Employees, Including In- fante.

Immediately upon the cessation of picketing and other concerted activities, Respondent offered to reinstate all striking employees. In spite of this fact, Infante failed to return to work, even when all other employees had done so. Infante did nothing for fifteen days. Respondent's conduct in reinstating all other employees constituted the offer to return which they all accepted. Infante's conduct constituted a refusal of this offer. Where an employer offers reinstatement and the employee refuses that offer, the employee's rights against the employer terminate immediately. *NLRB v. Abbott Publishing Co.*, 331 F. 2d 209 (CA-7 1964); *Nevada Truck & Casing Co.*, 131 NLRB 1352 (1961).

C. Infante Is Not Entitled to Reinstatement or Back Pay Since He Failed to Make a Timely and Unequivocal Application for Reinstatement.

A request for reinstatement must be made within a short time after the strike has ended. *Crosby Chemicals*, 105 NLRB 152 (1953); *Art Crayon Co.*, 7 NLRB 102 (1938).

A strike ends when other employees go back to work and the offer to the employees to reinstatement and the acceptance by the employees of such reinstatement takes place. *R. J. Oil & Refining Co.*, 108 NLRB 641 (1954); *Freisinger (North River Yard Dyers)*, 10 NLRB 1043 (1939); *Carrollton Metal Products Co.*, 6 NLRB 569 (1938).

Here, the employer's conduct constituted an offer to all employees for reinstatement. All employees, including Infante, knew of the offer and all, except Infante, accepted it. For fifteen days after all other employees had returned to their jobs, he did not even approach Respondent. By that time such rights as he might have had had withered and died. For, as recognized by the Board, (*Williams Coal Co.*, 11 NLRB 579) timing is one of the crucial elements in reinstating strikers and, where some strikers return to work, all strikers are thereby required to make a timely and unequivocal application for reinstatement or to lose their rights.

Here, the strike had been over for two weeks before Infante even called Respondent. Then, when told to return to work at a certain time before the work com-

menced the following morning, he did not do so but showed up a day late, at a time when he knew all the available trucks would have left Respondent's plant on their assigned routes to pick up trash and garbage. He simply was told that the trucks had left and that there was no work available for him *that day*. Infante was never heard from again. Neither his words nor his conduct amount to a request for reinstatement. Infante, by his own conduct, failed to reply to Respondent's offer to return to work and is, therefore, entitled to no remedies or relief under the Act. See *G. W. Emerson Lumber Co.*, 101 NLRB 1046 (1952).

D. General Counsel Carries Burden of Proving by Substantial Evidence That Not Only the Discharge but Also the Refusal to Reinstatement Was Discriminatory in Order for the Board to Apply the Drastic Remedies of Reinstatement and Back Pay.

Finmore Corp., 131 NLRB 84 (1961);

Radio Industries, 11 NLRB 912 (1952).

In applying this same rule in reference to the employer's rights to discharge or refuse to reinstate, the Circuit Court in *NLRB v. Tex-O-Kan Flour Mills, Inc.*, 122 F. 2d 433, stated:

"So far as the (Act) goes the employer may discharge, or refuse to reemploy for any reason, just or unjust, except discrimination because of union activities and relationship." (p. 438).

Respondent did not discriminate against Infante, or any other employee, because of union activities and

relationship. Instead, Respondent immediately reinstated all employees who applied, and immediately sat down with the union and negotiated a collective bargaining agreement which has since been executed for a term of five years. The lack of any anti-union animus on Respondent's part is further evidenced by the Stipulation on file herein requesting a dismissal of all issues which the parties themselves have the power to dismiss. Against this factual background, the General Counsel cannot even begin to sustain its burden of proving, by substantial evidence, that Respondent discriminated against Infante.

“Court has discretion to deny enforcement of the Board's order on the ground that there has been no affirmative showing of an unlawful anti-union motivation on the part of the Employer.” (*NLRB v. Great Dane Trailers*, 388 U.S. 26).

Thus, an employee's failure to report to work when told to do so justifies his discharge by the employer. *Aluminum Screen & Window Co.*, 136 NLRB 663 (1962); *Hot Shoppes, Inc.*, 146 NLRB 81 (1964); *Wear Ever Shower Curtain Corp.*, 143 NLRB 34 (1963). Here, the Board should reject the charge of a discriminatory failure to reinstate for the additional reason that, even though his tardy application for reinstatement was considered by Respondent, Infante himself failed to follow the simple, procedural steps required to regain his position. The General Counsel cannot produce one fact to show that Respondent discriminated against Infante. Infante did this himself.

E. Even if Infante Should Be Entitled to Reinstatement, He Is Not Entitled to Back Pay.

Back pay is a separate and additional remedy from reinstatement. *NLRB v. Ingram*, 273 F. 2d 670 (CA-5 1960). In *Ingram*, the Court quotes the *Tex-O-Kan Flour Mills, Inc.*, and explains the nature of a back pay award as follows:

“ ‘Orders for reinstatement of employees with back pay are somewhat different. They may impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law. The evidence to justify them ought therefore to be substantial, and surmise or suspicion, even though reasonable, is not enough.’ ” (p. 675).

Conclusion.

The Stipulation and settlement agreement should be a final answer to all issues raised in this case. The order the Board seeks to enforce here, including the reinstatement of Paul Infante, would seriously impair the harmonious bargaining relationship between the parties and would frustrate rather than effectuate the policies of the Act.

In addition, independent of the Stipulation and settlement agreement, the facts demonstrate that Infante should not be given any relief under the Act. Of primary importance is the fact that Respondent did not discriminate against anybody, including Infante. All employees were offered reinstatement; all accepted the offer immediately, except Infante. His offer to return, if it was an offer, came too late. In addition, he fur-

ther demonstrated to Respondent his total lack of interest in his job.

Infante is not entitled to either reinstatement or back pay. Respondent has not discriminated and should not be penalized with an order requiring it to either reinstate a person who obviously did not want reinstatement, or to pay him for work he did not offer to perform.

For the reasons stated, it is respectfully requested that the Court refuse to issue a decree enforcing the Board's order in any respect.

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United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

C & C PACKING COMPANY,
Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board

BRIEF FOR THE
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FILED

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WM. B. LUCK, CLERK

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United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 22,417

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

C & C PACKING COMPANY,
Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court upon petition of the National Labor Relations Board to enforce its order issued against C & C Packing Company on March 29, 1967. The Board's

decision and order (R. 20-27, 44-45),¹ are reported at 163 NLRB No. 90. This Court has jurisdiction under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), the unfair labor practices having occurred in Phoenix, Arizona, where respondent is engaged in the processing, sale, distribution and packing of meat and meat products. There is no issue as to the Board's jurisdiction.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union² after the Union had established its majority status by a card check. The facts upon which the Board based its findings may be summarized as follows:

During March and early April, 1966, Austin Allen, secretary-treasurer of Local 448 and International Representative Harold Benninger signed up 15 employees in a production and

¹ References to the pleadings, decision and order of the Board, the Trial Examiner's recommended decision and order and other papers reproduced as Volume I, Pleadings, are designated "R." References to portions of the stenographic transcript reproduced pursuant to the Rules of this Court are designated "Tr." "G.C. Exh." refers to the General Counsel's exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

² The Union involved is Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 448, AFL-CIO.

maintenance unit of 22 eligibles at respondent's plant (R. 22; Tr. 31, 102). Many of the employees are Spanish-speaking; hence, the union representatives took with them to employee homes one Pete Garcia, a Spanish-speaking member of the Union from another plant who, when necessary, read the language of the cards to employees in both English and in Spanish (Tr. 32-38, 102-119). By March 26, having acquired 11 cards or well over the 30 percent required for an election, the Union filed a representation petition with the Board's Regional Office in Phoenix (R. 21; Tr. 120).

On April 7, Board Agent Deeny called a meeting of union and company representatives for purposes of processing the petition. Attending were Union Representatives Allen and Benninger along with respondent's attorneys, Lawrence Pavilack and John Gigounas. David Crockett, respondent's secretary-treasurer, also attended (R. 21; Tr. 43-44). Deeny broached the possibility of a consent election conducted by the Board, whereupon Pavilack said he would like to talk to the Union privately (R. 21; Tr. 45-47). Deeny absented himself and Pavilack then commented that he considered Allen "fair"³ and then asked if the Union would withdraw its representation petition if it could prove it had 51 percent of the employees (R. 21; Tr. 47). Somewhat surprised, Allen said that, contingent on approval by his superiors, he would set up a card check and let Pavilack know (Tr. 48).

On April 12, Allen called Pavilack, told him the Union had withdrawn its petition and suggested April 12 for the card check (R. 21; Tr. 49). Pavilack agreed but set the date at April 14 so David Crockett could attend (Tr. 49, 203). Allen then called the Board and asked it to run the card check. The Board agent refused, but suggested the Federal Mediation and Conciliation

³ Allen has been secretary-treasurer of the local in Phoenix for 10 years (Tr. 31).

Service. The Service suggested William Halloran, a retired mediator, who agreed to serve on April 14 (R. 22; Tr. 9).

The April 14 meeting began at Pavilack's office. It was attended by Allen and Benninger, the two union representatives, Pavilack and Gigounas, respondent's attorneys, and respondent's secretary-treasurer, David Crockett (Tr. 124). Pavilack opened the meeting by asking if the Union had brought a contract proposal. Allen said "no," that he had anticipated only a card check but that he would be ready with a contract in a week (R. 22; Tr. 50).

The meeting then adjourned to the Federal Mediation Service offices where Pavilack produced a typed list of employees and Allen handed Halloran the 15 cards mentioned above. Halloran first asked if there were any "problems or challenges" (Tr. 10-11, 248). Assured by both sides that there were none, he then twice checked the names on the cards against the typed list, announced the result as 15 of 22 for the Union, placed both cards and list in an envelope, sealed it with tape, wrote his name across it and gave it to the union representatives for delivery to the Board's office (R. 22, G.C. Exh. 2, Tr. 13). The Company did not ask to see the cards (Tr. 25). Nor did it assert any reservations respecting whether it would bargain as a result of the card check (Tr. 26).

As the parties left the room, Allen agreed with Pavilack that a meeting would be held at 1:30 p.m., Tuesday, April 19, at Pavilack's office (R. 22; Tr. 60). A day or so later Allen got a letter from Pavilack dated April 14 asking for a draft contract to "give us an opportunity to review it to determine the matters that are in agreement and those that we must discuss" (R. 22; Tr. 61, G.C. Exh. 18).

On Monday, April 18, Allen and Benninger drafted a contract proposal and hand-delivered two copies with an accompanying letter to Pavilack's office (R. 22; Tr. 66). On April 19, however, Allen received the following letter from Pavilack:

I have just been informed by our client, C. and C. Packing Company that they desire to have an election to determine whether or not the majority of the employees want to be represented by the Union prior to entering into any negotiations regarding the proposed contract. Mr. M.L. Crockett, President of C. and C. Packing Company, stated that some employees requested him to have an election as they felt that the majority of the employees did not want to be represented by the Union and, therefore, he felt that in order to be fair to all of the employees, an election should be held.

I realize this letter may take you by surprise, but I am just expressing my client's desires and feel that this would probably be fair in light of the fact that some of the employees do not want to be represented by the Union. This would clarify any doubt any of the employees would have in their minds as to whether or not the majority of the employees want to be represented by the Union.

I am in receipt of your proposed contract but I have not opened it in light of the fact that we now desire to have an election prior to entering into negotiations.

We feel this decision should not affect our negotiations and entering into a contract should the employees elect your Union. In order to satisfy all of C. and C. Packing Company's employees, it is felt that an election would be in the best interests of all.

I am sure you understand our position and, therefore, hope that we can arrange for the election at the earliest possible date so that we can begin negotiations on a contract, assuming that the majority of the employees desire to be represented by the Union. I think this would be in the best interests of all.

Our meeting set for April 19, 1966 should, therefore, be cancelled. I will be pleased to meet with you and Mr. Deeney [sic] at your convenience for the purpose of amicably working out details of the election.

If you have any questions regarding this matter, please do not hesitate to call or write.

Forty-five minutes after Allen opened the letter, respondent's attorney Gigounas telephoned him to ask whether he had received the letter (R. 23; Tr. 69). Allen said he had but insisted the Company bargain on the basis of the card check; Gigounas said he would check and call back but he did not call. The Union accordingly filed the charge herein on April 27 (R. 20; G.C. Exh. 22, Tr. 69-71).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union after the Union had established its majority by a card check (R. 27, 45).

The Board ordered respondent to cease and desist from the unfair labor practices found, to bargain with the Union on request, and to post the usual notices (R. 27, 45).

ARGUMENT

THE BOARD PROPERLY FOUND THAT
RESPONDENT VIOLATED SECTION 8(a)
(5) AND (1) OF THE ACT BY REFUSING
TO BARGAIN WITH THE MAJORITY
REPRESENTATIVE OF ITS EMPLOYEES,
AFTER REQUESTING A CARD CHECK
AND AGREEING TO BE BOUND BY ITS
RESULTS

Section 8(a)(5) of the Act requires an employer “to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).” That section provides that “Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . .” Although under Section 9(c)(1) the Board conducts elections to determine representative status, it has long been settled that such status may be shown by other means. See, *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62, 71-72. Thus, when a majority of employees in an appropriate unit sign union authorization cards, an employer violates Section 8(a)(5) if he insists on an election and refuses to recognize and bargain with the union, unless such refusal is motivated by a good faith doubt of the union’s majority status. *Retail Clerks Union, Local 1179 v. N.L.R.B.*, 376 F.2d 186, 190 (C.A. 9); *N.L.R.B. v. Security Plating Co.*, 356 F.2d 725, 726-727 (C.A.9); *N.L.R.B. v. Hyde*, 339 F.2d 568, 570 (C.A. 9); *Snow v. N.L.R.B.*, 308 F.2d 687, 691, 694 (C.A. 9); *N.L.R.B. v. Trimfit of California, Inc.*, 211 F.2d 206, 209-210 (C.A. 9); *Joy Silk Mills v. N.L.R.B.*, 185 F.2d 732, 741 (C.A.D.C.), cert. denied, 341 U.S. 914. As we show below, the record in this case shows with unmistakable clarity that respondent’s refusal to bargain was not motivated by a good faith doubt of the Union’s majority and was, therefore, unlawful.

As shown in the Statement, the union organizers, accompanied by a Spanish-speaking employee from another plant, visited respondent's employees, some of whom are Mexican-Americans, in their homes, explained the purpose of the union cards and signed up 15 of the 22 eligibles between mid-March and early April 1966. The Union filed an election petition with the Board on March 26. However, when the parties met on April 7 to work out details of a possible consent election agreement, respondent asked if the Union would withdraw its petition if a majority could be proved. Taken somewhat by surprise, the union representatives asked for time. Their superiors approved the Company's suggestion, however, and the Union withdrew the petition, told respondent on April 12 it had done so and was ready for the card check. Respondent suggested April 14. The Union accordingly engaged Mediator Halloran and met with respondent as scheduled.

As the meeting with Halloran began, the Union's cards were in the possession of Organizer Allen and respondent in turn had a typed list of the 22 persons in the appropriate unit. Halloran counted the cards, examined the signatures, compared the names with those on the list and announced the result as 15 of 22 for the Union. Respondent and the Union agreed to meet April 19 to begin negotiations and on April 15 respondent wrote the Union for its contract proposal to make the April 19 meeting more productive. The Union hand-delivered a draft to respondent on April 18. Early the next day, the Union got a special delivery letter stating respondent's "desire to have an election" because "some of the employees do not want to be represented by the Union" (G.C.Exh. 21). Respondent called to see whether the Union had received its letter. Allen said he had, that he stood on the results of the card check and that he wanted to negotiate right away. Respondent has never responded to this request.

The record shows that on the occasion of the card check on April 14, none of respondent's three representatives who were present expressed the slightest reservation about the propriety of the card count made by Mediator Halloran, nor was any doubt raised that the Union in fact had a majority. Equally noteworthy was respondent's letter received by the Union on April 19 which expressed no doubt concerning the Union's majority; nor was any claim made in the letter that the card count was invalid or that the cards had been improperly obtained from the employees. This case is virtually indistinguishable, therefore, from *Snow v. N.L.R.B.*, *supra*, where the employer also agreed to a check of union authorization cards by a neutral person and subsequently rejected the results of the check and insisted on an election. There, as here, the employer having been presented with strong, if not conclusive, evidence of the union's majority failed completely to show that his subsequent refusal to bargain was based on a good faith doubt of that majority. Also see *Retail Clerks Union, Local 1179 v. N.L.R.B.*, *supra*.

Before the Board, respondent contended that by taking part in the card check, it did not forfeit its "right" to a Board election. It is well settled, however, that "an employer has no absolute right to demand an election" but must bargain with the designated representative of his employees in the absence of a good faith doubt of its majority status. *N.L.R.B. v. Hyde*, *supra*, 339 F.2d at 570, n.1. This contention by respondent is further unavailing, because it rests on the discredited testimony of one of respondent's counsel that the other counsel stated at the April 14 check that, "This is not to impair either parties' rights to request an election until there is actually recognition of the Union by valid means" (Tr. 198). This evidence was rebutted by the credited testimony of two of General Counsel's witnesses, Mediator Halloran and Union Organizer Allen. Halloran testified that no statement was made that the card check was not to be used to determine majority representation (Tr. 26). Allen was even more explicit; he testified "I

would be out of my mind" (to agree to a reserved right to a Board election after a card check). "It would cost me my job" (Tr. 95). The Trial Examiner credited Halloran and Allen and went into detail as to why he discredited respondent's version of what transpired (R. 23-26). Respondent has shown no reason for overturning these credibility determinations and they warrant affirmance by this Court. See *Shattuck Denn Mining Corp v. N.L.R.B.*, 362 F.2d 466, 469 (C.A. 9); *N.L.R.B. v. Carpenters Local No. 2133*, 356 F.2d 464, 466 (C.A. 9).

Before the Board respondent also attempted to challenge the Union's majority on the basis of interrogation of employees which it conducted two days before the start of the Board hearing. Respondent sought to show that because certain of the employees principally spoke Spanish they did not understand the meaning of the union cards. The Trial Examiner, however, credited the testimony of Union Representatives Benninger and Allen and concluded that "partially through the use of an interpreter the employees knew full well the meaning of the authorization cards they were signing." (R. 24).

Respondent also tried to show that employees were induced to sign cards for the Union on the misrepresentation that their only purpose was to secure an election.⁴ Respondent relied,

⁴ The language of the cards is unambiguous and contains no reference to a Board election. It is as follows (G.C.Exh. 4-17):

AUTHORIZATION FOR REPRESENTATION UNDER THE
NATIONAL LABOR RELATIONS ACT

I hereby authorize the AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, to represent me and bargain collectively with my employer in my behalf, to negotiate and conclude all agreements concerning wages, hours and all other conditions of employment.

(Cont'd on p. 11)

for this purpose, on the testimony of five witnesses, two of whom, Alvarado and Walker, did not remember that the union representatives, Benninger and Allen, had said anything about an election (Tr. 179, 193). Leyba and Nunez both testified that they were told that there would be an election, but neither testified as to any representation by the union agents concerning the use to which the card would be put.⁵ The only employee who testified that the union representative had told him that signing the card would enable an election to be held was Sanchez. However, Sanchez did not testify that this was the *only* reason that he was asked to sign the card. Under the Board's established test for determining whether there has been such misrepresentation as to invalidate a card, it is necessary to establish that the union solicitor indicate to the signer that the card would be used *only* for a Board election; it is not enough to show that he discussed the possibility of an election and that the cards might also be used for that purpose. *Cumberland Shoe Corp.*, 144

(Cont'd from p. 10)

I hereby revoke and rescind any power and authority heretofore executed by me, and declare that this authorization supersedes any other which I may previously have given to any person or organization to represent me for the purposes above set forth. This authorization shall remain in full force and effect for one year from date hereof.

A single card, signed by Roberto Salinas, contains somewhat different, but similarly unambiguous language. (G.C. Exh 3).

⁵ Since the Union filed an election petition on March 26, a few days after most of the employees were signed up, it would not be surprising if an election was mentioned while efforts were made to get the employees to sign cards. In any event, since respondent induced the Union to withdraw its election petition and offered recognition if the Union could prove its majority through a card check, respondent is hardly in a position to challenge the majority on the ground that representations concerning an election were made at the time the Union obtained its cards.

NLRB 1268, enforced, 351 F.2d 917 (C.A. 6). Accord: *Aero Corp.*, 149 NLRB 1283, 1289-1290, enforced, 363 F.2d 702 (C.A.D.C.), cert. denied, 385 U. S. 973; *United Automobile Workers v. N.L.R.B.*, No.20,137, November 14, 1967, 66 LRRM 2548, 2552-2553 (C.A.D.C.); *N.L.R.B. v. Southbridge Sheet Metal Works*, 380 F.2d 851, 855-856 (C.A. 1). See also, *NLRB v. Hyde, supra*, 339 F.2d at 570-571 (C.A. 9). Accordingly, respondent's challenge to the validity of Sanchez' card is unavailing. In any event, since the Union had cards from 15 of the 22 employees in the unit, it's majority did not turn on the validity of Sanchez' card.

In sum, as aptly stated by the Trial Examiner: "It does not require more than a comment that the evidence offered by Respondent is inadequate to impeach the union authorization cards signed by Respondent's five witnesses" (R.25). Plainly, the five cards were properly considered by the Board in finding that the Union had a majority. See, *N.L.R.B. v. Security Plating Co., supra*, 356 F.2d at 726-727 (C.A. 9); *N.L.R.B. v. Mutual Industries, Inc.*, 382 F.2d 988, 989 (C.A. 9). Accordingly, respondent's duty to bargain arose at the August 14 card check when it observed and did not question the Union's majority. As recently pointed out by the Seventh Circuit (*N.L.R.B. v. Richman Brothers Co.*, No. 16,159, decided December 13, 1967, 67 LRRM 2051, 2054):

When all genuine doubt of the union's majority status in an appropriate unit has been erased, the employer's duty to bargain collectively becomes fixed. The employer may not evade that duty by marking time until the union's majority is lost through its own efforts [citing *N.L.R.B. v. Mid-West Towel & Linen Service, Inc.*, 7 Cir. 339 F.2d 958 (1964); *N.L.R.B. v. Philamon Laboratories, Inc.* 2 Cir., 298 F. 2d 176, cert. den., 370 U. S. 919 (1962); *Joy Silk Mills, supra*], or through forces for which it is not accountable [citing *Retail Clerks Union, Local 1179*

*(John W. Serpa) v. N.L.R.B., supra, (C.A. 9), and
Snow v. N.L.R.B., supra (C.A. 9)] .*

CONCLUSION

For the reasons set forth above, it is respectfully requested that the Board's order be enforced.

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March 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

APPENDIX B

Pursuant to Rule 18(2) (F) of the Rules of the Court
(Numbers are to pages of the Reporter's Transcript).

<u>Exhibit No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
General Counsel's			
1 (a) through			
1 (o)	7	7	7
2	13	14	15
3	33	34	34
4	35	38	38
5	39	105	105
6	39	107	110
7	39	109	110
8	39	110	112
9	39	112	117
10	39	119	120
11	39	119	120
12	39	119	120
13	39	119	120
14	39	119	120
15	39	119	120
16	39	119	120
17	55	119	120
18	60	61	61

B-2

<u>Exhibit No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
19	63		not offered
20	65	66	66
20 (a)	65	66	66
20 (b)	65		not offered
21	67	68	68
21 (a)	67	68	68
22	70	71	71
22 (a)	70	71	71

Respondent's

1	144	rejected
2	155	rejected
3	155	rejected
4	155	rejected
5	155	rejected
6	155	rejected
7	155	rejected
8	164	rejected
9	164	rejected
10	164	rejected
11	164	rejected
12	164	rejected
13	164	rejected
14	164	rejected
15	164	rejected
16	164	rejected

No. 22,417

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

C & C PACKING COMPANY, Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
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FILED

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National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, <u>et seq.</u>) Section 8(a)(5)	1
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IN THE
UNITED STATES COURT OF APPEALS
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No. 22,417

NATIONAL LABOR RELATIONS BOARD,
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C & C PACKING COMPANY, Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. Respondent attacks authorization cards in general (br. pp. 36-37) and the cards here in particular (br. pp. 21-32) as unreliable evidence of majority union representation. This attack is wide of the mark, for the Board has never asserted that authorization cards are to be preferred over a secret ballot election in determining union representation of employees. See, for example, *Aaron Brothers Company of California*, 158 NLRB 1077, 1078. For this reason an employer, upon a union's request for recognition and bargaining, is privileged to assert his good faith doubt of the union's majority based on cards and to insist upon an election, without being found in violation of Section 8(a)(5) of the Act. *Pyne Moulding Corp.*, 110 NLRB 1700, 1707, enf'd 226 F.2d 818 (C.A. 2). Accord: *Aaron Brothers*, *supra*; *H & W*

Construction Co., Inc., 161 NLRB No. 77, 63 LRRM 1346, 1347; *Textile Workers Union v. N.L.R.B.*, 386 F.2d 790, 792 (C.A. 2).

But where, as here, the employer expresses no such doubt, but himself suggests and takes part in a card check by an impartial observer as a substitute for processing the union's petition to election, he cannot escape his bargaining obligation by subsequently contending that the cards evidencing majority were invalid. *Snow v. N.L.R.B.*, 308 F.2d 687 (C.A. 9) (majority established through card check by minister, followed by refusal to bargain); *Kellogg's, Inc.*, 147 NLRB 342, 346, enf'd, 347 F.2d 219 (C.A. 9) (card check by third party followed by actual bargaining and insistence on Board election by newly retained counsel); *Dixon Ford Shoe Co., Inc.*, 150 NLRB 861, 871 (card check by third party showed majority, but employer rejected results and insisted on Board election).

The record shows that respondent raised no question of card validity either before or during the April 14 card check, nor did he do so in his April 18 letter cancelling the next day's scheduled bargaining session (G.C. Exh. 21). As aptly stated by the Trial Examiner (R. 23):

Noteworthy in this letter is that there is no claim that the Union's majority was questioned or that the card count was invalid or that the employees didn't understand what they were signing or that the signatures were forged or that the cards were obtained by misrepresentation as to their purpose or that the card check was not for the purpose of obtaining majority representation.

Moreover, the letter does not square with respondent's assertion (br. p. 63), that "during every meeting with the Union [respondent] informed the union representatives that it doubted that the union actually represented the majority of its employees." For the letter frankly acknowledges that its contents "may take you by surprise," but that nevertheless an election "would probably be fair in light of the fact

that some of the employees do not want to be represented by the Union” (G.C. Exh. 21). Accordingly, because it was not until the hearing and then only on the basis of questionnaires gleaned from the employees two days before the hearing that the issue of validity was raised, the Trial Examiner limited examination respecting cards to the authenticity of the signatures and to the question whether the signers were told that the cards were *only* to get an election. See *Cumberland Shoe Corporation*, 144 NLRB 1268, enf’d, 351 F.2d 917 (C.A. 6). None of respondent’s five witnesses on this point claimed that their signatures were not authentic. Indeed, no employee was even asked that question, and no employee testified that he was told that the cards were only to get an election. Hence, even if departure from the *Cumberland* rule (see *N.L.R.B. v. Southland Paint Co.*, No. 24275, decided May 8, 1968, 68 LRRM 2169 (C.A. 5)) were to void the card of Sanchez, the only one of the five to testify that he was told the card would *enable* an election to be held (Tr. 187), this would not defeat the majority showing here, since even by respondent’s reckoning, there were but 24 employees in the unit (br. p. 5).

In addition, as pointed out in the Board’s opening brief (p. 3), the record supplies substantial support for the validity of all 15 of the cards, for (1) the Union took care that the Spanish-speaking employees were read the card’s language both in Spanish and in English (Tr. 32, 38, 84, 102-119); (2) the language of the cards made it clear that by signing the cards the employees were authorizing their immediate representation by the Union (G.C. Exh. 4-17); (3) the cards were signed over a period of nearly a month rather than in a “whirlwind campaign” of a few days,¹ thus providing ample opportunity for employee discussion of the merits of the Union. Accordingly, the Trial Examiner clearly acted reasonably in not permitting the record to be unduly length-

¹Cf. *N.L.R.B. v. Lovvorn*, 172 F.2d 293, 294 (C.A. 5); *N.L.R.B. v. Bedford-Nugent Corp.*, 317 F.2d 861, 865 (C.A. 7).

ened by the employees' "afterthoughts" as to why they signed the cards. See *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732, 743 (C.A.D.C.), cert. denied, 341 U.S. 914; accord: *James E. Matthews Co. v. N.L.R.B.*, 354 F.2d 432, 438 (C.A. 8), cert. denied, 384 U.S. 1002

2. Respondent also now challenges the reliability of the card check on the ground that Halloran was known to the Union but not to respondent and that he failed to compare handwriting in determining whether card signatures were genuine. These contentions likewise have no merit. First, Halloran had never met Benninger of the Union, had not seen Allen for a year and had never talked to him about the matters at issue here (Tr. 22). Secondly, respondent did not challenge Halloran's impartiality until the Board hearing and it was similarly content with his method of card checking, i.e., a double check that each signature corresponded to a name on respondent's list.² Finally, in the absence of a request or an objection by respondent we submit that it is immaterial that the Union did not show the cards to respondent, for the Union's expressed concern over possible reprisal was obviously one of the reasons it sought a third party observer.³

²Since as we note above, respondent did not dispute the authenticity of signatures even at the hearing, this could not have been of major concern to it at the card check.

³It is recognized that unless an employer challenges a union's majority at the time of request for recognition, evidence of such majority need not be produced. *N.L.R.B. v. Security Plating Company, Inc.*, 356 F.2d 725, 727 (C.A. 9); *N.L.R.B. v. Trimfit of California*, 211 F.2d 206, 209-210 (C.A. 9); *N.L.R.B. v. Greenfield Components Corporation*, 317 F.2d 85, 87 (C.A. 1); *N.L.R.B. v. Geigy Co., Inc.*, 211 F.2d 553, 555 (C.A. 9).

3. Respondent also contends the General Counsel failed to show its lack of good faith (br. p. 59, *passim*). This contention is entirely negated by the only reasons given by respondent itself for refusing to bargain, namely, that "some employees requested [respondent] to have an election as they felt that the majority of the employees did not want to be represented by the union . . ." (G.C. Exh. 21). Under such circumstances, it is immaterial that some employees may have expressed doubt about the wisdom of signing their cards, for as we pointed out in our opening brief (p. 12), it is the obligation of the employer to bargain that becomes fixed when a majority claim is made which he does not challenge. As this Court stated in *Snow v. N.L.R.B.*, *supra*, 308 F.2d at 694:

The fact as to whether an employer entertained a genuine doubt that a union represents a majority of the employees is to be determined as of the time the employer refused to recognize the union. Once it is shown that the employer entertained no genuine doubt of this kind at the time it refused to bargain, an unfair labor practice has been established. The fact that, as it later developed, there were grounds which might have created a genuine doubt at that time is immaterial.

Accord: *N.L.R.B. v. Kellogg's Inc.*, *supra*, 347 F.2d at 220 (C.A. 9).

Further, respondent's plea in mitigation of its conduct that it did not resort to acts of interference, restraint and coercion to undermine the Union and dissipate its majority (br. p. 60-61) is unavailing. Proof of good or bad faith doubt of majority status requires examination of the employer's entire course of conduct. In the instant case respondent itself gave the best possible evidence that it was aware of the Union's majority, for it suggested and freely took part in a card check which settled the matter conclusively in favor of the Union. It therefore obviously refused to bargain on April 18, because it hoped the employees would change their minds. See *Retail Clerks Union, Local 1179*

v. N.L.R.B., 376 F.2d 186, 191 (C.A. 9); *Snow v. N.L.R.B.*, *supra*, 308 F.2d at 693. Accordingly there is no need in this case to look for further interference with the employees' rights to establish respondent's motivation.

4. Lastly, respondent's contention (br. p. 72) that in limiting the examination of its witnesses to relevant matters the Trial Examiner gave "the appearance of a partisan tribunal" is a common ground of complaint by the loser in any contest. *N.L.R.B. v. Lewisburg Chair & Furniture Co.*, 230 F.2d 155, 156 (C.A. 3). See also *N.L.R.B. v. Phaoston Instrument & Electronic Co.*, 344 F.2d 855, 859 (C.A. 9). As pointed out above, the Examiner properly excluded reconstructions of the intentions of card signers solicited five months after the event. His findings "exhibit careful consideration and evaluation of conflicting claims and evidence" and are therefore entitled to affirmance. *N.L.R.B. v. Harrah's Club*, 362 F.2d 425, 430 (C.A. 9); cert. denied, 386 U.S. 915. Accord: *N.L.R.B. v. Luisi Truck Lines*, 384 F.2d 842, 846-847 (C.A. 9); *N.L.R.B. v. Carpenters Local No. 2133*, 356 F.2d 464, 466 (C.A. 9); *N.L.R.B. v. U.S. Divers, Inc.*, 308 F.2d 899, 905 (C.A. 9).⁴

⁴Respondent's charge (br. p. 69), that the Trial Examiner stated that "even if the cards were admittedly signed under false representation, that it would not invalidate the cards or would not be sufficient to dispute the majority" is a misquotation of the record. The Examiner's statement was an analysis of the *Snow* case. He said "... in that case [*Snow*], some of the cards were admittedly signed under false representations, but that was not enough to dispute the majority." (Tr. 116-117) Here false representations were neither admitted, shown, nor even alleged until the hearing. The Examiner's rulings, we submit, correctly restrained respondent from embarking on a fishing expedition.

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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May 1968

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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v.

C & C PACKING COMPANY,
Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board

RESPONDENT'S BRIEF

RAWLINS, ELLIS, BURRUS & KIEWIT

By _____
PETER KIEWIT, JR.

and

By _____
LAWRENCE L. PAVILACK

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,417

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

C & C PACKING COMPANY,
Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board

RESPONDENT'S BRIEF

JURISDICTIONAL STATEMENT

Respondent concurs with the Statement
of Jurisdiction as contained in the brief
submitted by the National Labor Relations
Board.

STATEMENT OF CASE

Respondent feels that the statement of the case made by Petitioner is insufficient. Respondent, therefore, presents the following statement:

There is no doubt that Respondent attended a meeting with the Union where Mr. Halloran counted some cards and compared the names on the cards with the names on a typewritten list. This meeting arose out of a petition to hold an election by the Union, which petition was subsequently withdrawn at the urging of the NLRB representative, Mr. Deeny, which led to the meeting with Mr. Halloran (Tr 200, 88). All witnesses concurred with this fact.

The meeting with Halloran was not a valid reliable card check for the purpose of determining the Union's majority, and

it was not agreed upon by the parties, nor was there ever a card check for the purpose of determining the Union's majority. It is the Union's interpretation that Halloran determined that 15 employees signed and designated the Union. Halloran testified that he conducted the card count because of a telephone call from Louis Ziman. (Tr. Page 9, line 6). Halloran had a typewritten list which he compared to the names on the cards, but he compared no signatures (Tr. Page 24, line 7). None of the cards were read by Halloran nor were the contents or the names on the cards read aloud by Halloran. (Tr. Page 24, line 15). It was never determined whether the names on the cards were written or printed because of Trial Examiner's erroneous ruling prohibiting such cross-

examination. (Tr. Page 30, line 21).

The General Counsel never established whether Halloran had even seen any of the signatures of the employees before the meeting. What occurred was that the Union withdrew its petition and arranged a meeting with Halloran, unbeknown to Respondent. At the meeting with Halloran, Halloran compared names on cards with names on a typewritten list. The names on the cards may have been written or typed. Neither the cards nor the names were read aloud. Halloran found that 15 names on the cards corresponded with 15 names on the list. Whether the list was complete or not was never established by General Counsel. There were probably one or two more employees, and possibly even more. Therefore the exact size of the bargaining unit was never established.

(Tr. Page 20, line 6; Trial Examiner's Decision, Footnote 2). The unit may have been as large as 30 employees, although the record does indicate that the unit probably consisted of 24 employees.

Prior to the meeting with Halloran, a meeting had been arranged for April 19, 1966. When this meeting was arranged is a disputed fact, and not an undisputed fact as stated in Trial Examiner's Decision. (Tr. Page 214, line 19; Page 228, line 4). A letter confirming the meeting went out in the usual course of office operations on the 14th. (Petitioner's Exhibit 18).

After the meeting with Halloran, Respondent's counsel informed R. David Crockett of the results, and Mr. Crockett emphatically stated that this was impossible.

Mr. Crockett testified that he had reason to doubt the Union's majority, in answer to a question from the Trial Examiner. (Tr. Page 290, lines 20 and 25).

Mr. Crockett was unable to testify to the reasons for his doubt. It is his state of mind which controls, and Trial Examiner committed error in disallowing testimony as to his state of mind. (Tr. Page 289, line 14).

Mr. Crockett would have testified as to his reason for disbelieving the Union represented 15 employees. To understand why Respondent in good faith did not believe the Union represented 15 men, it is necessary to determine the composition of the unit. First, the number of employees in the unit was never established by substantial evidence. At least seven of the employees could understand

Spanish, but not English. (See rejected exhibits 2 through 17). This means that the employees understood little or no English. Further, the testimony of Leyva, Alvarado, Nunez and Sanchez shows that they had very little formal education. If the Trial Examiner did not erroneously limit the amount of examination, Respondent would have shown that the said employees did not know what they were signing.

So what we had was a group of employees, with little formal education, a number of whom could not speak English. (See Rejected Exhibits 2 through 17).

The knowledge of this fact, plus other information received by the Respondent's President, M. L. Crockett, and its Secretary-Treasurer, R. David Crockett, caused them to believe in good faith that the Union could not

possibly represent 15 employees. The above facts would have been introduced had not the Trial Examiner erroneously determined that any such objections were waived because of the so-called card check. (Tr. Page 114, lines 1 through 9; Page 115, line 5; Page 133, line 22; Page 134, line 1).

The testimony of Leyva, Nunez and Sanchez indicated that the purpose of signing cards was to vote, and not to designate the Union. Thus, if their cards are disallowed, the Union had only 12 cards at the most out of 24 employees. If Respondent could have properly examined Walker, his questionnaire could have been used to refresh his memory, wherein he stated that he signed the card only to obtain an election. Alvarado, in his questionnaire, couldn't even understand the contents of the card. Therefore, the Trial Examiner should have allowed the use of their questionnaires for the purpose of

refreshing their memory, or for the impeachment of their testimony as a result of Respondent being surprised by said testimony, and for the impeachment of the testimonies of Mr. Allen and Mr. Benninger.

SPECIFICATIONS OF ERRORS

1. THE TRIAL EXAMINER ERRED IN RULING THAT NO TESTIMONY WOULD BE PERMITTED ATTACKING THE VALIDITY OF THE UNION AUTHORIZATION CARDS UNLESS SUCH TESTIMONY WAS LIMITED TO THE FOLLOWING AREAS:

A. WHETHER THE EMPLOYEE WAS TOLD THAT THE CARDS WOULD BE USED ONLY TO HAVE AN ELECTION.

B. WHETHER THE SIGNATURE ON THE CARD WAS THE GENUINE SIGNATURE OF THE EMPLOYEE PURPORTING TO HAVE SIGNED THE CARD (TR. 116, 117, 133, 151, 152, 167, 172, 173, 175, 176, 179, 186).

2. THE RECORD TAKEN AS A WHOLE DOES NOT BY SUBSTANTIAL EVIDENCE SUPPORT THE BOARD'S FINDINGS THAT THE MEETING WITH MR. WILLIAM HALLORAN WAS A VALID CARD CHECK FOR THE PURPOSE OF RECOGNIZING THE UNION NOR THAT THE METHOD USED WAS A RELIABLE METHOD OF RE-

COGNIZING A UNION, SUFFICIENT TO REPLACE A SECRET BALLOT ELECTION AS PROVIDED IN SECTION 9(C) OF THE NATIONAL LABOR RELATIONS ACT.

3. THE TRIAL EXAMINER ERRED IN LIMITING THE CROSS EXAMINATION OF MR. BENNINGER THEREBY PREVENTING RESPONDENT FROM ASCERTAINING THE VALIDITY OR INVALIDITY OF THE UNION AUTHORIZATION CARDS (TR. 133).

4. THE TRIAL EXAMINER ERRED BY STRIKING, AS IMMATERIAL, THE ANSWER OF MR. HALLORAN TO THE FOLLOWING QUESTION: "HAD YOU AT ANY TIME PRIOR TO LOOKING AT THE SIGNATURES ON THE CARDS TO THE BEST OF YOUR KNOWLEDGE SEEN THE SIGNATURES OF ANY OF THOSE INDIVIDUALS?" (TR. 30).

5. THE TRIAL EXAMINER ERRED IN DENYING RESPONDENT THE RIGHT TO USE

QUESTIONNAIRES OF THE EMPLOYEES FOR PURPOSES OF IMPEACHING THE AUTHORIZATION CARDS ADMITTED INTO EVIDENCE AND FURTHER ERRED IN DENYING RESPONDENT THE RIGHT TO USE THE QUESTIONNAIRES TO REFRESH THE MEMORY OF WITNESSES, ALL OF WHOM WERE EMPLOYEES OF RESPONDENT (REJECTED EXHIBITS 2 THROUGH 16; TR. 151, 152, 166).

6. THE TRIAL EXAMINER ERRED IN STRIKING THE TESTIMONY OF MR. ALVARADO, WHOSE TESTIMONY WAS MATERIAL AND HIGHLY IMPORTANT TO RESPONDENT'S PROOF OF THE INVALIDITY OF THE UNION AUTHORIZATION CARDS (TR. 176).

7. THE TRIAL EXAMINER ERRED IN RULING THAT RESPONDENT COULD NOT ASK OF THE WITNESS MR. LEYVA IF THE UNION CARD WAS READ TO HIM (TR. 173).

8. THE TRIAL EXAMINER ERRED IN FINDING AS A FACT THAT THE EMPLOYEES KNEW FULL WELL THE MEANING OF THE AU-

THORIZATION CARDS THEY SIGNED (TRIAL EXAMINER'S DECISION PAGE 5).

9. THE NLRB FAILED TO PROVE BY SUBSTANTIAL EVIDENCE THAT RESPONDENT DID NOT HAVE A GOOD FAITH DOUBT OF THE UNION'S MAJORITY.

10. THE TRIAL EXAMINER'S STATEMENTS AND ACTIONS DURING THE HEARING CONVEYED THE APPEARANCE OF A PARTISAN TRIBUNAL ALL TO THE DETRIMENT AND PREJUDICE OF RESPONDENT.

ARGUMENT

SPECIFICATION OF ERROR # 1

THE TRIAL EXAMINER ERRED IN RULING THAT NO TESTIMONY WOULD BE PERMITTED ATTACKING THE VALIDITY OF THE UNION AUTHORIZATION CARDS UNLESS SUCH TESTIMONY WAS LIMITED TO THE FOLLOWING AREAS:

A. WHETHER THE EMPLOYEE WAS TOLD THAT THE CARD WOULD BE USED ONLY TO HAVE AN ELECTION.

B. WHETHER THE SIGNATURE ON THE CARD WAS THE GENUINE SIGNATURE OF THE EMPLOYEE PURPORTING TO HAVE SIGNED THE CARD (TR 116, 117, 133, 151, 152, 167, 172, 173, 175, 176, 179, 186).

It is fundamental that an employer cannot lawfully recognize a Union or be guilty of refusing to bargain unless and until the Union's majority is proved by a reasonable method. Robeson Cutlery Co.

(1946) 67NLRB481.

Respondent respectfully urges that the Trial Examiner committed reversible error throughout the hearing in making rulings severely limiting and, in fact, making it impossible for Respondent to examine witnesses with respect to the following areas:

A. Whether the signature was obtained through duress or coercion or was obtained voluntarily.

B. Whether the employee could read or understand English.

C. Whether the employee knew what he was signing.

D. Whether card was read to the employee prior to his signing it.

E. Determination of the statements and representations made to the employees by the Union Solicitors.

F. Whether, in fact, the card actually represented the true intent of the party signing it.

This line of questioning is of utmost significance. The statements made by Union representatives to uneducated, Mexican-Americans who cannot read, write, speak nor understand the English language is important. As recently as March, 1968, the court in NLRB v. Shelby Mfg. Co., (3-7-68) stated about authorization cards.

"They were calculated to and did indicate a purpose to secure an election. This is all the more clear from evidence that the card solicitors did, in fact, represent to a number of employees that their purpose was to secure an election."

Accordingly, the cards can't be used to support the bargaining order, concluded the Court.

In NLRB v. Dan Howard Mfg. Co., (1-12-68) the court stated it must determine the style or actual words a union agent used when soliciting cards. The cards will be rejected, the court said, if in their total context they made the employee believe their purpose was to get an NLRB election.

In the case at bar the Trial Examiner refused to receive any testimony concerning the circumstances surrounding the signing of the cards.

See also NLRB v. S. E. Nichols Co., (USCA-2 6-21-67). Engineers and Fabricators, Inc. v. NLRB (5th Cir. 4-12-67). Bauer Welding & Metal Fabricators, Inc. v. NLRB (8th Cir. 1966) 358 F. (2d) 766. NLRB v. Swan Super Cleaners, Inc. (10-25-67.)

These cases support the position that the cards are invalid as a substi-

tute for an election if the employees are led to believe the Union would represent them only after winning an election, even though they are also told the cards might be shown to the employer.

The Trial Examiner ruled on a number of occasions during the hearing that he would permit no testimony unless it was limited to two questions, namely;

1. Whether the employee was told that the card was to be used only for the purpose of having an election.

2. Whether the signature was the actual signature of the employee.

(Tr. 116, 117, 133, 151, 152, 167, 172, 173, 175, 176, 179, 186).

Clearly these rulings by the Trial Examiner were erroneous and resulted in the hearing being conducted without Respondent having the proper opportunity

to determine the validity or invalidity of the signature cards.

In John P. Serpa, 155 NLRB NO. 12, the Court said:

"When General Counsel seeks to establish a violation of Section 8 (a)(5) on the basis of a card showing, he has the burden of proving not only that a majority of the employees in an appropriate unit signed cards designating the Union as bargaining representative, but also that employer in bad faith declined to recognize and bargain with the Union."

(Emphasis supplied)

In NLRB v. Kohler, 328 F2d 770 (7th Cir. 1964) the Court said the employer's good faith was irrelevant once the Union's majority was not established.

There were fifteen (15) authorization cards allegedly signed by Respondent's employees introduced into evidence. (Petitioner's Exhibits 3-17).

The evidence is unclear as to the number of employees in the bargaining unit, as this was never established by General Counsel. The uncontradicted evidence does establish that the unit contained somewhat more than twenty-two (22) men. Mr. Halloran did say that the list he had showed twenty-two (22) names. Therefore, the minimum number of employees in the bargaining unit would have to be at least twenty-two (22), and it may have contained more employees. This fact was never established. (See Footnote 2 of Trial Examiner's Decision).

Respondent attempted to disqualify some of these cards by direct testimony and by introducing questionnaires taken of Respondent's employees for the purpose of showing that employees signed only for the purpose of holding an election, and to show that several employees didn't know what

they were signing, in order to contradict and impeach the testimony of Allen and Benninger. Trial Examiner improperly refused the admission of this evidence, to which exceptions were made. The use of these questionnaires was not even permitted by the Trial Examiner for the purpose of refreshing the recollection of the employees who signed them (Tr. Page 151, line 24 through Page 152, line 1; Page 166, line 15).

Respondent introduced the testimony of Mr. Conception H. Alvarado, Mr. Andres M. Leyva, Mr. Narcisco G. Nunez and Mr. Magdaleno M. Sanchez and Mr. David Walker for the purpose of disqualifying the cards they allegedly signed. Because of the limited examination allowed Respondent's attorney, to which exceptions were made, Respondent was unable to inquire fully into the

validity of the cards, the circumstances surrounding their signing, and the intent of the parties signing (Tr. 116, 117, 133, 151, 152, 167, 172, 173, 175, 176, 179, 186)

The questionnaires (Respondent's Exhibits 1 through 16 in the Rejected Exhibit File) of the employees who testified clearly establishes that the answer contained therein weighed with their testimony, would establish that because of the language and educational barriers, their authorization cards should on the basis of the supporting evidence offered, be disqualified. Their testimony alone would indicate beyond a doubt that they had little or no conception of what they were signing. These employees who do not know the English language need special protection.

FIBRE Leather Mfg. Corp. 167NLRB No. 51.

Mr. Allen and Mr. Benninger testified that a Mr. Pete Garcia, who allegedly

spoke Spanish, accompanied them when they obtained the signatures from the Spanish speaking employees, but Mr. Garcia was never produced as a witness by the General Counsel and Respondent, by the Trial Examiner's ruling was prevented from eliciting testimony concerning Mr. Garcia from the employees themselves (Tr. 172). Therefore, it was never established by substantial evidence that the meaning and import of the cards was carefully and correctly read and explained to the Spanish speaking employees in a language they understood, as Mr. Garcia spoke Spanish, and not Mr. Allen or Mr. Benninger (Tr. 83, 141), and there is no way of knowing what the Spanish speaking employees told Mr. Garcia. Anything related to Mr. Allen or Mr. Benninger by Mr. Garcia as to what the Spanish speaking employees said is

pure hearsay. This in itself should dis-
qualify the cards of the Spanish speaking
employees, because the cards they signed
may not reflect their real intention, since
the cards were in English. See Norlee Togs,
Inc., 129 NLRB 14 (1960), where the Board
found a good faith doubt on employer's
part when non-English speaking employees
did not intend signing cards to authorize
the Union to represent them. Respondent
in the case at bar was even denied, by an
erroneous ruling of the Trial Examiner,
from asking the employees if Mr. Garcia
was actually present when the cards were
signed or whether the cards were read to
them (T 173, 174). Thus Respondent was
prohibited from introducing impeachment
testimony to refute the statements made
by Mr. Allen and Mr. Benninger. Since
the cards were admittedly written in

English, and a number of the employees could neither read nor understand English, the rulings of the Trial Examiner prevented witnesses from stating whether the cards were read to them or whether they had any idea of what they were signing appears to violate a basic concept of evidence as established by our courts and offers no protection to these uneducated Americans of Mexican ancestry from possible acts of unscrupulous labor leaders.

The record of the hearing clearly proves by unimpeached testimony that when Mr. Benninger makes an unequivocal statement there is good reason to seriously doubt its accuracy. When questioned about Mr. Sanchez (Tr. 109) Mr. Benninger stated that Mr. Sanchez speaks English well and understands English well. Then during the brief examination of Mr.

Sanchez allowed by the Trial Examiner (Tr. 185) the Trial Examiner himself asked the following elementary question:

"If I understood you correctly,
you do or do not understand
English."

The witness made no response until the question was repeated in Spanish by the interpreter. Contrary to Mr. Benninger's firm statement, this uneducated employee was not even able to understand a most elementary question asked in English. Respondent should have the opportunity to fully explore the events and conversations occurring at the time the cards were allegedly signed.

There were seven questionnaires submitted, but not admitted into evidence, which were filled out in Spanish. These questionnaires would have established the inability of the employees to speak or

understand English and their very limited formal education. Four of the employees who testified - Conception H. Alvarado, Andres M. Leyva, Narcisco G. Nunez and Magadaleno M. Sanchez, could not speak or understand English, and an interpreter had to be used. There is grave doubt that these four witnesses had any understanding of what they had signed.

The witnesses testified as follows:

Conception H. Alvarado: Mr. Alvarado, in his questionnaire which was introduced, but not admitted into evidence, which he signed, states that he did not understand the language of Question No. 9, which was printed in English as follows:

"9. Do you understand the following? "I hereby authorize the AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, to represent me and

bargain collectively with my employer in my behalf, to negotiate and conclude all agreements concerning wages, hours, and all other conditions of employment.

'I hereby revoke and rescind any power and authority heretofore executed by me, and declare that this authorization supersedes any other which I may previously have given to any person or organization to represent me for the purposes above set forth. This authorization shall remain in full force and effect from one year from date hereof."

Mr. Alvarado's limited two years of formal education as shown in his questionnaire would clearly substantiate that he had no understanding of what he was signing and that the contents of the cards was never carefully and correctly read and explained to him, and that he signed thinking he was signing for an election. The Trial Examiner's rulings prevented

Respondent from eliciting this testimony during direct examination (Tr. 176, 177). If this is considered with his testimony in which he evidenced a complete ignorance of what he was doing when he signed the card, his card should be disallowed. General Counsel failed to introduce evidence that Mr. Alvarado clearly understood what he was signing. The burden is on the General Counsel to prove the validity of the cards, and in this respect, the General Counsel failed.

Andres M. Leyva: Mr. Leyva testified that he was told there was going to be an election to vote for the Union, at the time he signed the card. Considering Mr. Layva's inability to speak and understand the English language, and his limited formal education, his card should be disallowed. General Counsel failed to introduce evidence showing Mr. Leyva clearly

understood what he was signing.

Narcisco G. Nunez: Mr. Nunez testified that something was said about voting, and again considering his inability to speak and understand the English language, and his very limited education, his card should be disallowed. The General Counsel again failed to establish that the contents of the card were carefully and clearly explained to him, so that he clearly understood what he was signing.

Magadalenno M. Sanchez: Mr. Sanchez testified that he was told that the purpose of signing the card was just to have an election, and again considering his inability to speak and understand the English language and his very limited formal education, his card should clearly be disallowed. The General Counsel failed to establish that the contents of the card were carefully and clearly

explained to him, so that he clearly understood what he was signing.

David Walker: Mr. Walker stated in his questionnaire, which was marked for identification, in his answer to Question No. 7:

"Were you ever told that if you would sign a Union authorization card that it would only be for the purpose of holding an election to determine whether or not the majority of the employees desired a Union?"

(Underlined for emphasis)

Answer: "Yes".

The limited amount of examination allowed Respondent's counsel prohibited the proper refreshing of Mr. Walker's memory. It is Respondent's position that the questionnaire should have been allowed for the purpose of refreshing or impeaching Mr. Walker's testimony. If Walker's memory

was refreshed through the use of his questionnaire he would have substantiated the fact that he signed only for the purpose of obtaining and election. In addition to Mr. Walker's card, the cards of the four Spanish speaking witnesses (three of whom were born in Mexico) should be disallowed, thereby giving the Union only eleven (11) cards out of Twenty-two (22) names on the list, and the unit may have been as high as twenty-four (24), or even more. The cards of all Spanish speaking employees should be disallowed because of General Counsel's failure to establish by substantial evidence that the cards' contents were clearly explained and that they understood what they were signing, and the purpose for which they were signing. It is accepted that cards generally speak for themselves, but the cards in this case should not speak for themselves for the reasons herein mentioned.

There are numerous cases which hold that authorization cards should be rejected if the

cards were signed to obtain an election and not to authorize Union representation. NLRB v. Winn-Dixie Stores, Inc., 341 F2d 750 (6th Cir. 1965); Englewood Lumber Company, 130 NLRB 394 (1961).

Cases which have decided that absence of real proof of fraud or deceit calls for a finding that employee knew what he was doing would not apply to the facts of this case, since an employee cannot know what he is doing unless he can understand the language. This is especially true of individuals who have never completed grade school or High School. The seven (7) questionnaires in Spanish, which were marked for identification, and the testimony of four (4) of the Spanish speaking employees, above mentioned, clearly establishes the fact that the General Counsel should have established by substantial evidence that the said employee had the card they signed carefully explained to them in Spanish, and that they understood the contents of said card. This was never done.

Spanish-American employees who have a limited education, as evidenced by their questionnaires, and do not understand English, should not be placed in the position of having to understand the difference between being told "signing the card will bring about an election" and "the card is only to get an election". The "only" or "sole purpose" doctrine recently endorsed by the Board in Cumberland Shoe Corp., 144 NLRB 1268, 1269 (1963), enforced 351 F2d 817 (6th Cir. 1965), should not apply to employees who cannot understand English and have very little formal education. How can such employees exercise a reasoned choice in the absence of a clear explanation and understanding of what they are doing?

Based on a total context of the facts in this case, the authorization cards of the Spanish speaking employees, and especially the four Spanish employees who testified, should be disallowed, since the General Counsel did not prove by substantial evidence that the cards' contents and

impact were carefully explained in a language the employees understood. This should be the minimum requirement in factual situations such as this in order to allow a Union to detour around the secret ballot provision of Section 9(c) and thereby force recognition via authorization cards.

Respondent urges to the Court the necessity to protect employees who because of their place of birth or limited education would otherwise be highly vulnerable. The right of these individuals to avail themselves of our democratic secret ballot system should not be negated by the high pressured tactics sometimes used by labor organizations which tactics and the legal results thereof are too subtle and too complex for these unsuspecting employees to comprehend. Respondent urges the court, because of the background of the employees, to resolve all disputes in favor of the employees' right to a secret ballot election.

ARGUMENT

SPECIFICATION OF ERROR # 2

THE RECORD TAKEN AS A WHOLE DOES NOT F
SUBSTANTIAL EVIDENCE SUPPORT THE BOARD'S FINDING
THAT THE MEETING WITH MR. WILLIAM HALLORAN WAS A
VALID CARD CHECK FOR THE PURPOSE OF RECOGNIZING
THE UNION NOR THAT THE METHOD USED WAS A RELIABLE
METHOD OF RECOGNIZING A UNION, SUFFICIENT TO RE
PLACE A SECRET BALLOT ELECTION AS PROVIDED IN
SECTION 9(C) OF THE NATIONAL LABOR RELATIONS
ACT.

The history of the National Labor Relations
Act strongly suggests that the secret ballot was
intended to provide an exclusive procedure for
selecting a bargaining representative. Before
1947, Section 9(c) of the National Labor Rela-
tions Act empowered the Board, in deciding the
issue of representation, to "take a secret bal-
lot of employees or utilize any other suitable
method to ascertain such representation". Na-
tional Labor Relations Act (Wagner Act) 49 Stat

53 (1953). The Taft-Hartley revisers, in rewriting Section 9(c), provided only for the secret ballot procedure for deciding the issue of representation. Despite this change in legislative history, the Board and the courts seem to have endorsed the pre-revision interpretation of Section 9(c) permitting a union to become the exclusive representative without a 9(c) election. It is a misinterpretation of Section 9(c) to allow card checks to replace a secret ballot election. Union Authorization Cards, 75 Yale Law Journal, P 820 t. seq. (1966)

When an election is not used, the substituted method should be reliable, and one which is agreed upon by the Union and the Employer, since the solicitation of authorization cards is virtually unregulated, unlike a secret ballot election, which is closely regulated. When authorization cards are used in place of secret ballot elections, the authorization cards should be accepted only if both parties agree to a card check,

and the card check is conducted by a reliable method which also establishes the validity of the cards. This is absolutely necessary in order to protect the employees themselves; otherwise, employees may have a union representing them which was never their intention when signing such cards. This is especially true when many employees cannot read, write, nor understand English. Solicitation of cards is frequently irregular, and statistics have shown their unreliability. See 1962 Proceedings Section of Labor Relations Law, American Bar Association 14-17; NLRB v. Johnnie's Poultry Co., 344 F2d 617, 620 (8th Cir. 1965).

The General Counsel is basing his case on Fred Snow & Sons v. NLRB, 308 F2d 687 (9th Cir. 1962), where the court said that the employer did not have a

genuine good faith doubt when he received reliable information of Union representation through a card check conducted by a clergyman selected by both the employer and the Union. The card check was conducted by the clergyman by comparing signatures on the cards with signatures on W-2 Income Tax Forms furnished by the employer. This was a reasonably reliable method under the circumstances, in that the employer joined in the selection of the clergyman and signatures were compared. In Snow & Sons, supra, the court found that the employer's objective in seeking delay and its rejection of the collective bargaining concept was manifest when the employer repudiated the previously agreed upon card check. .

The Board, in John P. Serpa, supra, held that the mere fact that the Union

placed cards in front of the employer in such a way that employer probably saw the names and signatures could not create an obligation to bargain or establish the employer's bad faith. The Board, in John P. Serpa, supra, distinguished Snow & Sons, supra, in a footnote when it said:

"This is clearly distinguished from Snow & Sons, 134 NLRB 709, where the employer agreed to the check of cards against the payroll by a neutral third party and thereafter rejected the result of such a check and sought a Board election."

Snow & Sons, supra, was again distinguished in NLRB v. Porter County Farm Bureau Co-operative Association, 314 F2d 133 (7th Cir. 1963). The court distinguished the Snow case, supra, saying that the reason for the Snow holding was:

"That a clergyman selected by management representatives as a neutral person to examine the signatures informed them in writing that the cards were applications for Union membership."

(emphasis supplied)

In the case at bar, Respondent never did receive information as to what the cards contained. In fact, during every meeting held with the Union, the Union representative informed Respondent that it couldn't see the cards nor know the contents. Thus, there was no way Respondent could make any challenges. In Porter, supra, Union and management had previously met to discuss matters of general interest. So, the mere fact that Respondent met with the Union to discuss preliminary matters should not be a basis of inferring that the Respondent desired to recognize the Union without it first establishing its majority at an election or by some other reliable method.

Mr. Halloran was selected by the Union without any knowledge or consent of Respondent (Tr. 22, 51, 52, 204, 205). Respondent had no idea that the Union wanted

to inform Respondent of the number of employees it felt it represented in this manner until the April 14th meeting, at which time Respondent went along, relying on the fact that there was an agreement with the Union that reserved to Respondent the right to petition for a secret ballot election if the preliminary discussions failed.

There was no evidence introduced to show that Respondent had rejected the collective bargaining principle. To say that what occurred at the meeting with Mr. Halloran was a card check is implausible in the context of the facts of this case. This case is clearly distinguishable from Snow & Sons, supra. The Union's purpose was to avoid a card check which would be agreeable to both parties, by alleging that the meeting with Mr. Halloran was in fact a card check mutually agreed upon by the

parties, thus imposing and forcing the Union upon the employees without their right to a secret ballot election.

IT IS RESPONDENT'S CONTENTION AS ESTABLISHED BY THE TOTAL CONTEXT OF THE FACTS IN THIS CASE THAT WHAT OCCURRED IN MR. HALLORAN'S OFFICE WAS NOT A CARD CHECK TO CONSTITUTE A SUBSTITUTE FOR THE SECTION 9(c) ELECTION PROCEDURE, AND THAT THE MERE NOTIFICATION BY MR. HALLORAN THAT THE UNION HAD FIFTEEN SIGNED CARDS, BY MERELY COMPARING THEM TO A TYPEWRITTEN LIST OF NAMES (TR 24), WITHOUT INFORMING THE RESPONDENT OF THE CARDS' CONTENTS, OR COMPARING SIGNATURES, AND NOT INQUIRING INTO THE CIRCUMSTANCES AS TO HOW THE CARDS WERE ACQUIRED, IS AN ABSOLUTELY UNRELIABLE METHOD OF INFORMING RESPONDENT OF THE UNION'S MAJORITY. IN ADDITION, MR. HALLORAN ADMITS THAT HE

DID NOT EVEN READ THE CARDS (TR 24).

In the Yale Law Journal article, *supra*, on page 818, the following was said:

"Authorization cards are an unreliable index of employee choice. Compared with the secret ballot they replace, their solicitation is a woefully defective process, guaranteeing the employees neither a fair nor a reasoned choice. Their admitted inferiority to a properly conducted secret ballot should preclude their use absolutely when the employer has not committed an unfair practice interfering with employee free choice."

Thus, when a card check is to be a substitute for a secret ballot election, it should be conducted in such a way as to assure that the employees' choice is to have a union represent them.

The card check in our case was not conducted in this manner, because the Respondent had never intended Mr. Halloran's count to constitute a card count for the determination of the Union's majority.

Based on the history of Section 9(c) of the National Labor Relations Act, this Respondent should not be bound to recognize the Union under the circumstances of this case, since this was not a card check for the purpose of recognizing the Union, and it was further a most unreliable method of informing Respondent of Union's majority.

SPECIFICATION OF ERROR # 3

THE TRIAL EXAMINER ERRED IN LIMITING THE CROSS EXAMINATION OF MR. BENNINGER THEREBY PREVENTING RESPONDENT FROM ASCERTAINING THE VALIDITY OR INVALIDITY OF THE UNION AUTHORIZATION CARDS (TR 133).

The Trial Examiner ruled that Respondent by agreeing to a card check (which is an issue in controversy) waived all right to attack the validity of the

authorization cards except the question of whether or not the signature is the actual signature of the employee purporting to sign the card. This position of the Trial Examiner, Respondent respectfully alleges, is in error. Especially in the case of non-English speaking employees, is the intent of the party signing the card important. NORLEE TOGS, INC. (1960) 129 NLRB 14. There are many circumstances under which a card can be invalid. Coopers, Inc. (of Georgia) (1954) 107 NLRB 979. Flint River Mills, Inc. (1953) 107 NLRB 472. Brezner Tanning Co., Inc. (1943) 50 NLRB 894, 141 F2d 62; NLRB vs. Thompson, Inc. (2 Cir. 1953) 208 F2d 743. These cases all state that if the Union doesn't have a majority, without counting invalid designations, the employer cannot recognize the Union as the bargaining

agent of the employees.

The Trial Examiner, by preventing Respondent from inquiring into the matter of the validity or invalidity of the authorization cards, deprived the employees and the employer of valuable rights granted to them under the National Labor Relations Act.

SPECIFICATION OF ERROR # 4

THE TRIAL EXAMINER ERRED BY STRIKING, AS IMMATERIAL, THE ANSWER OF MR. HALLORAN TO THE FOLLOWING QUESTION: "HAD YOU AT ANY TIME PRIOR TO LOOKING AT THE SIGNATURES ON THE CARDS TO THE BEST OF YOUR KNOWLEDGE SEEN THE SIGNATURES OF ANY OF THOSE INDIVIDUALS?" (TR 30).

Examining the record as a whole it is evident that the purported card check was not conducted under such circumstances as would be deemed adequate to give validity

to the card check sufficient to prevent the employees from exercising their right to a secret ballot election.

The cards allegedly checked by Mr. Halloran were matched against a type-written list of names (Tr. 24). Mr. Halloran admitted that he did not read all of the cards and may have read one or two only (Tr. 24). The employer had nothing to do with picking Mr. Halloran nor did the employer Respondent know Mr. Halloran at all, while at the same time Mr. Halloran was known by the members of the Union (Tr. 22,). In addition, the Trial Examiner ruled that Respondent could not inquire as to whether or not the signatures on the cards were written or printed since the answer would be immaterial. Mr. Pavlack asked Mr. Halloran on cross examina-

tion:

"Do you remember if any of the names were printed on the cards or if they were all written signatures, Sir?" (Tr. 29)

An objection was made and improperly sustained (Tr. 30). Respondent excepted to the ruling (Tr. 30). Respondent respectfully maintains the signature of the party purporting to sign the card is of fundamental importance.

SPECIFICATION OF ERROR # 5

THE TRIAL EXAMINER ERRED IN DENYING RESPONDENT THE RIGHT TO USE QUESTIONNAIRES OF THE EMPLOYEES FOR PURPOSES OF IMPEACHING THE AUTHORIZATION CARDS ADMITTED INTO EVIDENCE AND FURTHER ERRED IN DENYING RESPONDENT THE RIGHT TO USE THE QUESTIONNAIRES TO REFRESH THE MEMORY OF WITNESSES,

ALL OF WHOM WERE EMPLOYEES OF RESPONDENT
(REJECTED EXHIBITS 2 THROUGH 16; TR. 151,
152, 166).

The testimony of Mr. Allen and Mr. Benninger was credited by the Trial Examiner and was of primary importance in the case being presented by the NLRB. The Trial Examiner's refusal to allow documents impeaching the testimony of the witnesses called on direct examination by the NLRB prevented Respondent from utilizing one of the basic tools permitted by our adversary proceedings, namely; the right of cross examination and the right to impeach witnesses. The argument of respondent in support of Respondent's Specification of Error # 1, is hereby adopted in further support of the argument in support of Specification of Error # 5.

SPECIFICATION OF ERROR # 6

THE TRIAL EXAMINER ERRED IN STRIKING THE TESTIMONY OF MR. ALVARADO, WHOSE TESTIMONY WAS MATERIAL AND HIGHLY IMPORTANT TO RESPONDENT'S PROOF OF THE INVALIDITY OF THE UNION AUTHORIZATION CARDS (TR 176).

The direct examination of Mr. Alvarado by Mr. Pavilack was as follows:

Question: "Please state your name and address for the record."

Answer: "Conception Alvarado, 24-10 South 18th Street, Phoenix."

Question: "Do you read English?"

Answer: "No."

Question: "Do you read Spanish?"

Answer: "No."

Question: "Do you write English?"

Answer: "No."

Question: "Do you write Spanish?"

Trial Examiner: "All right, now, all of that testimony may be stricken."

Striking of this testimony by Trial Examiner was in furtherance of his improper rulings that no testimony could be taken or elicited showing or tending to prove the invalidity of the cards unless the testimony dealt only with the genuiness of the signature or any statement made to the employee that the card would be used only for the purpose of having an election. As argued in support of Specification of Error # 1, this ruling by the Trial Examiner is in error and resulted in prejudice against Respondent.

SPECIFICATION OF ERROR # 7

THE TRIAL EXAMINER ERRED IN RULING THAT RESPONDENT COULD NOT ASK OF THE

WITNESS MR. LEYVA IF THE UNION CARD WAS READ TO HIM (TR 173).

It is significant to note that the Spanish interpreter was required during the taking of the testimony of Mr. Leyva (Tr. 168, 169). It is also significant that the Union authorization cards were written in English (National Labor Relations Board Brief Page 10). It is also significant that the questionnaire of Mr. Leyva, as contained in the Rejected Exhibit File, contains the following questions and answers in Spanish:

C U E S T I O N A R I O

1. Cuanta escuela tiene usted? (4-Años)*
2. Donde nacio usted? (-En Mexico)*
3. Habla usted Ingles? (-No)*
4. Comprende Ingles usted? (Si)*
5. Cual is la idioma principal que habla usted? (Español)*

6. Ha oido rumores usted que la planta C and C Packing Company se va a cerrar si los empleados no se enlazan con la union? (No)*

A. Si su respuesta es "Si", como se informo de este rumor?

7. Fue usted informado que si daba su firma a la tarjeta de authorizacion de union seria solamente para una eleccion para determinar si la majoria de empleados desean la union? (Si)*

A. Si su respuesta es "Si", quien le dijo? (El representante de la union)*

8. Fue usted amenazado o forzado en cualquier modo para que firmara la tarjeta de union? (No)*

A. Si su respuesta es "Si", quien y como lo forzo o lo amenazo?

9. Comprende lo siquiente? (No)*

"I hereby authorize the AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, to represent me and bargain collectively with my employer in my behalf, to negotiate and conclude all agreements concerning wages, hours, and all other conditions of employment.

"I hereby revoke and rescind any power and authority heretofore executed by

* Parts of the questionnaire in parentheses indicate handwritten answers by Mr. Leyva

me, and declare that this authorization supersedes any other which I may previously have given to any person or organization to represent me for the purpose above set forth. This authorization shall remain in full force and effect for one year from date hereof."

Su Firma Andres Leyva

Fecha 8-22-66

In view of Mr. Leyva's having been born in Mexico his inability to read, write, or understand English, and the statement in his questionnaire that the Union authorization card was signed only for the purpose of having an election and that this was stated to him it appears extremely significant and important that Respondent be permitted to ask the question, "Was the Union authorization card read to you by the Union representative?" Certainly, under the circumstances which are present

in the case of Mr. Leyva the validity of the Union authorization card is an extremely important matter to be resolved and its validity is highly questionable. Respondent should have the opportunity to elicit testimony concerning this matter. By this ruling of the Trial Examiner, Respondent was prevented from asking the same or similar questions of the other employees. NLRB v. S. E. Nichols Co., (USCA-2 6-21-67). Engineers & Fabricators, Inc. v. NLRB (5th Cir. 4-12-67). Bauer Welding & Metal Fabricators, Inc. v. NLRB (8th Cir. 1966) 358 F(2d) 766. NLRB v. Swan Super Cleaners, Inc. (10-25-67).

SPECIFICATION OF ERROR # 8

THE TRIAL EXAMINER ERRED IN FINDING

AS A FACT THAT THE EMPLOYEES KNEW FULL WELL THE MEANING OF THE AUTHORIZATION CARDS THEY SIGNED (TRIAL EXAMINER'S DECISION PAGE 5).

Nowhere in the record did General Counsel for the NLRB establish by substantial evidence that the majority of the employees understood the meaning of their cards. Allen could not speak or understand Spanish (Tr. 83). Allen didn't understand what Mr. Garcia told the employees and whatever Garcia told Allen is pure hearsay. Mr. Benninger testified that he understood very little of what Mr. Garcia said, if any, and could not understand the answers which were in Spanish (Tr 142). Mr. Garcia was not a witness and therefore, the Trial Examiner is basing his conclusion on the hearsay testimony of Allen and Benninger as to

what was related to them by Mr. Garcia. This is not substantial evidence to support the Examiner's conclusion, especially in view of the Trial Examiner's position that Respondent was not permitted to question any of the employees concerning this question of whether or not they understood the meaning of the authorization cards they signed (Tr. 116, 117, 133, 151, 152, 167, 172, 173, 175, 176, 179, 186). Respondent's Rejected Exhibits 1 through 16 contained in the Rejected Exhibit File, indicate unequivocally that a significant number of the employees stated they did not understand the meaning of the statement contained on the Union authorization card. Unfortunately, the Trial Examiner saw fit to prevent and prohibit Respondent from introducing any direct testimony from the employees

substantiating what they stated in their questionnaire. In view of these circumstances, the conclusion of the Trial Examiner can hardly be said to have been supported by substantial evidence.

SPECIFICATION OF ERROR # 9

THE NLRB FAILED TO PROVE BY SUBSTANTIAL EVIDENCE THAT RESPONDENT DID NOT HAVE A GOOD FAITH DOUBT OF THE UNION'S MAJORITY.

One of the elements to be considered in determining whether an employer must recognize a union without an election is whether or not he had a genuine good faith doubt of the Union's majority, assuming, of course, that the union does in fact represent a majority of the employees. (This fact is in question in the case at bar) See John P. Serpa, *supra*.

Practically every case except Snow & Sons, supra, involved not merely an unfair labor charge under Section 8(a)(5), but additional unfair labor charges under Section 8(a) of the National Labor Relations Act on the part of the employer.

In the case at bar, the only charge against the Respondent is refusing to bargain, because Respondent allegedly received reliable information that the Union represented the majority of the employees. General Counsel has never alleged anything to the contrary and not one iota of evidence of any other alleged unfair labor practice has been alleged by the General Counsel.

The recent test enunciated by the Board regarding the proof of good faith doubt was in Aaron Brothers Company of California, 158 NLRB No. 108 (1966), where the Board said:

"Absent an affirmative showing of bad faith, an employer, presented with a majority card showing and a bargaining request, will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority."

(Emphasis supplied)

In Snow & Sons, supra, the court stated that if the card check indicated a majority of signatures, that the employer must have known that the union in fact had a majority. But in Snow & Sons, supra, the clergyman was selected by both the union and the employer; the clergyman informed the employer that the cards were applications for union membership, and the clergyman compared such signatures with signatures on W-2 Income Tax Forms.

This did not occur in the case at bar, and as previously discussed herein, Respondent could not in good faith rely on what

Mr. Halloran did, since he merely looked at the cards and compared names with a typewritten list, did not read the cards, and no inspection of cards was allowed. Respondent did not know the contents of the cards, or whether the signatures were the actual employees' signatures. In fact, Mr. Halloran did not know this, since he had no signatures to compare. Further, Mr. Halloran was selected without Respondent's approval or knowledge.

Therefore, Respondent's position in refusing to bargain because of the so-called card check cannot in itself constitute a showing of bad faith.

All other actions on the part of Respondent are consistent with its good faith doubt of the Union's majority.

The Respondent was willing to have a consent election. Respondent further

agreed to enter into preliminary discussions without an election, for the purpose of saving time, to determine what employees' grievances would be discussed, and to agree on a reliable method by which Respondent would recognize the Union, if the Union in fact represented the majority of the employees. The Respondent during every meeting with the Union, informed the Union representatives that it doubted that the Union actually represented the majority of its employees.

Respondent realized that when the Union said it felt it represented fifteen men, that this was impossible because of matters known by Respondent. For this reason, the Respondent requested the Union to establish its majority by an election. Respondent attempted to show its good faith doubt of Union's majority, but was prevented from

so doing by the erroneous rulings of the Trial Examiner (Tr. 294).

How can it be said Respondent's actions were inconsistent with its good faith doubt in the context of the above occurrences?

The consent election was originally set for April 27, 1966. Respondent informed the Union that they should go ahead with the election as previously agreed to by letter dated April 18, 1966. Respondent further filed a petition for an election on April 25, 1966. The election could have been arranged with very few days lost from the date originally set for the election.

So this is again unlike Snow & Sons, supra, where the employer refused to go ahead after the clergyman conducted a card check. The time lapse from the date of the original election would have been diminimus,

and would not have prejudiced the Union in any way, especially in light of Respondent's continued showing that it had no anti-union animus.

The Respondent was not trying to gain time to undermine the Union. In fact, the Respondent has been meticulous in its actions to avoid any implications that it is undermining the Union. There was not one iota of evidence introduced to show any undermining, or that Respondent was trying to gain time to accomplish an undermining of the Union.

The Respondent has no prior history of anti-union animus, and from the testimony introduced, it clearly established that the Respondent would bargain with the Union if this was what the employees wanted. The Respondent's only contention is that it in good faith does not believe the majority of its employees want the

Union, and that most of the employees who signed the cards signed only for the purpose of holding an election, or they did not know what they were signing. The evidence fails to show the Respondent had intimidated or coerced any of its employees into restraining from signing with the Union.

When the total picture is considered, there can be no other conclusion but that General Counsel has failed to prove by substantial evidence that Respondent did not have a good faith doubt of the Union's majority.

The test for substantial evidence means such relevant evidence as a reasonable mind might accept. Universal Camera Corp., v. NLRB, 340 U. S. 474 (1950).

It is Respondent's position that the General Counsel has failed to establish a prima facie case by substantial evidence affirmatively showing that Respondent

acted in bad faith under the Aaron Brothers test, supra.

SPECIFICATION OF ERROR # 10

THE TRIAL EXAMINER'S STATEMENTS AND ACTIONS DURING THE HEARING CONVEYED THE APPEARANCE OF A PARTISAN TRIBUNAL ALL TO THE DETRIMENT AND PREJUDICE OF RESPONDENT.

The Trial Examiner hearing this matter, before the end of the first morning of hearing and before even the second witness had completed his testimony, and before Respondent had an opportunity to present its case, had apparently already decided certain matters that were in controversy and were clearly of material significance in importance. The Trial Examiner stated:

"but, the fundamental thing here, there was an agreement to a card check and the petition was withdrawn prior to that, Sir there is no question about that. The rest of this is beside the point."
(Tr 92)

This question of whether or not there was an agreement to a card check was one of the fundamental questions to be resolved by the hearing officer. Apparently, this was decided before full evaluation of all evidence.

When Mr. Pavilack challenged the validity of the cards by questioning the intent of the parties when signing the cards (Tr. 113) the Trial Examiner made the following comment:

"The defense here seems certainly to approach the frivolous to me."

"Now, there may be, it may be that you will be able to produce one or two witnesses that will come in here and say, 'Well, we really didn't understand what we were signing', or something to that effect."

"But, in view of the course of events, I would regard that, I will advise you right now, as having very little weight, if any, if that is going to be your proposed defense."

Again it is obvious that this partisan tribunal had decided even prior to the completion of petitioners case that there was no

question as to the validity of the Union authorization cards, thereby, completely making it virtually impossible for Respondent to present his case with the knowledge that it would receive fair consideration and evaluation.

The Trial Examiner continued shortly thereafter by making a statement to the effect that even if the cards were admittedly signed under false representation, that it would not invalidate the cards or would not be sufficient to dispute the majority (Tr. 116, 117). It is Respondent's position that if the Union, in fact, did not represent a majority of the employees Respondent could not be found guilty of refusing to bargain with the Union or of refusing to recognize the Union. When this issue was presented to the Trial Examiner his reply was:

"Well, maybe we will get to that point, and maybe we will not"
(Tr. 117).

The Trial Examiner did throughout the hearing, as has been indicated throughout this brief, make rulings which resulted in Respondent's being prevented from presenting its case or from attempting to show the invalidity of the cards. Had Respondent had the opportunity to show that the obtaining of the signatures cards was by such means and methods as to render them invalid, the result might well have been that the Union at no time validly represented the majority of the employees.

This appearance of a partisan tribunal is further evident by an examination of the Trial Examiner's DECISION. A number of matters are contained under the heading "undisputed facts" which without question were disputed from the conception and are still in dispute. To Wit:

"Then Pavilack asked the Union representatives if they would be willing to withdraw the petition for an election if a majority could be proved."
(Trial Examiner's DECISION, Page 2)

This statement was in dispute at the time of the hearing and has never been resolved (Tr. 197, 271, 278).

Trial Examiner further stated:

"Upon being apprised of this development Deeny requested the petition to be withdrawn, apparently to meet the demands of Internal Board Administrative requirements." (Trial Examiner's DECISION Page 2).

(Emphasis supplied)

The underlined portion of the so-called undisputed fact was never brought out by the evidence, therefore it cannot under any circumstances be considered an undisputed fact.

Trial Examiner further stated:

"One or two days before the start of this hearing, Respondent called its employees in groups of five and interrogated them with respect to the Union authorization cards. It also required them to sign statements concerning the circumstances surrounding the signing of the cards." (Trial Examiner's DECISION Page 5)

There is absolutely no evidence in the record to show that the employees were required to sign statements. In fact, the contrary is evidenced since several of the questionnaires in the Rejected Exhibit File are unsigned. The Examiner's conclusion is mere speculation unsupported by substantial evidence or in fact any evidence all of which gives the appearance of a partisan tribunal.

The specific and cumulative effect of the hearing officer's statements and rulings renders the appearance of a partisan tribunal.

CONCLUSION

The National Labor Relations Act attaches great significance to a choice of the majority of employees. The Union elected by majority acts as the "exclusive representative" of all employees. See Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harvard Law Review 389, 396 (1950). It becomes extremely important, therefore, that the problem confronting the court be determined so as to give the proper intent and construction to the Act. The designation of a Union by cards rests upon a strained reading of the National Labor Relations Act. And beyond the question of interpretation, the Board has failed to evaluate fairly the card procedure with reference to important policy consideration. Note Union Authorization Cards, 75 Yale Law Journal 806.

The use of authorization cards as a substitute for a secret ballot election arises primarily from the construction of remedies of an unfair labor practice committed by an employer. It must be noted that the Act authorizes the Board to protect employee free choice not to penalize the employer. Note Union Authorization Cards, 75 Yale Law Journal 818. The author of the article in the Yale Law Journal continued with the following statement:

"Authorization cards are an unreliable index of employee choice. Compared with the secret ballot, their solicitation is a woefully defective process guaranteeing the employees neither a free nor a reasoned choice. Their admitted inferiority to a properly conducted secret ballot should preclude their use absolutely when the employer has not committed an unfair practice interfering with employee free choice."

In the case at bar there is not one iota of

evidence indicating any unfair practice by the employer interfering with employee free choice. If the real issue is the devising of remedies to protect employee free choice it is particularly difficult to justify depriving both employees and employers of an election when there has been neither unfair labor practices nor an election campaign.

Even with the scanty bit of testimony permitted to be elicited from the employees by virtue of rulings of the Trial Examiner, which appear to consistently favor the Union, it becomes evident that a substantial number of Respondent's employees are non-English speaking, reading, or understanding individuals who have limited education. Their right to a secret ballot election should be carefully guarded by the courts for the reasons cited in this

brief. Respondent respectfully prays that this honorable court deny the petition for enforcement of the order of the National Labor Relations Board.

RAWLINS, ELLIS, BURRUS & KIEWIT

By

Peter Kiewit, Jr.
PETER KIEWIT, JR.

By

Lawrence L. Pavilack
LAWRENCE L. PAVILACK

May, 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

Lawrence L. Pavilack
LAWRENCE L. PAVILACK

Attorney for Respondent



